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FOREIGN ATTACHMENT IN PENNSYLVANIA. (AN OUTLINE.)

In the ordinary course of the law of England a creditor could not resort to the property of his debtor in satisfaction of his demand until he had brought suit and obtained judgment and issued execution. The initial seizure of the goods and chattels of a debtor, it may be inferred, originated in an analogy to arrest on civil process for the purpose of compelling the attendance of the defendant, or it may have sprung from an ancient Roman practice whereby the effects of a debtor who had secreted himself at home to elude persecution were appropriated to the payment of his debts, after three efforts to summon him had failed to induce him to appear. Research on this historical question is of little moment in view of numerous authorities which state the antiquity of the proceeding styled foreign attachment in the Mayor's Court of London as one of the customs of London.

The custom was first certified by Starkey, Recorder of London, in 1482, Hariot Mayor, 22 Edw., 14 L., 175.[1]

[1] Set out in the *Mayor & Alderman of the City of London* v. *Cox*, Law Reports, 1867, 2 H. L., 239, p. 242.

This description is given in Bohen's Privilegia Londini, p. 253, etc.

[2] By the Cuftom of London one may attach Money or Goods of the Defendants, either in the Plaintiffs own Hands, or in the Custody of a third perfon, and that either in the Maior's Court or in the Sheriff's Court.

And *Note,* That the Cuftom of London is, That if any Plaint be affirmed in London before &c. against any man, and he is returned [3] nihil, if the plaintiff will furmife any other man who is within the City, is Debtor to the Defendant, in any Sum, he shall have his Garnishment against him for him to come and answer if he be indebted in the Form which the other hath alledged; and if he comes and does not deny it, then this Debt shall be attached in his Hands.

Note, the Plaintiff ought to furmife, that the other man who is indebted to the Defendant, is within the City.

* * * All *Attachments* are grounded upon Actions of Debt, and the manner of entering *Attachments* is the same as is before mentioned for entering Actions: And one of the six officers belonging to this court ought be employed to make the same. * * * *

In *London Joint Stock Bank* v. *Mayor of London,* 45 L. J. Rep. Com. Law, p. 213 (1876), Lord Coleridge in his discussion of the question whether the custom of foreign attachment can be enforced against a corporation as garnishee gives many citations in regard to the origin and scope of the proceeding. It was definitely settled in *The Mayor and Aldermen of London* v. *Cox, supra,* (note 2) that the Lord Mayor's Court in London is an inferior court. From the procedure in such a tribunal sprang the body of statutes in the United States, with countless suits. When the reader dwells on the jurisdiction, the judges, the four counsel, the four attorneys, the executive officers of the Mayor's Court, he wonders at the broad outcome of the custom which was so limited and local in its nature. The current

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[2] It was said by Coleridge, *C. J.,* in *London Joint Stock Bank* v. *Mayor of London,* 45 L. J. Rep., 1876, C. L., at p. 219 that much of Bohen's book was taken from Lex Londinensis, published in 1680.

[3] See the third plea in *London Joint Stock Bank* v. *Mayor of London,* p. 216: "That afterwards at the same court, the said Sergeant-at-Mace, according to such custom, returned and certified to the same court, that the said Thomas Griesielle had nothing within the said city or the liberties thereof whereby he could be summoned, nor was he to be found within the same, &c."

from a narrow source has broadened into a mighty volume of legal business.[4]

Each state has its own system provided by legislative enactments. The present purpose is to indicate the practice in Pennsylvania.

STATUTES.

It appears from a manuscript volume of the laws passed prior to the year 1700, that the first act upon the subject was that of May 16, 1699. This act recognized and confirmed writs of attachment issued before that time. Sergeant on For. Att., p. 2, note A (a copy is printed in the appendix on p. 278).

Then followed the Acts of 1700 and 1701, which were afterwards repealed (Carey & Bioren, Vol. I, p. 8, p. 34).

The next statute was "An Act about Attachments," passed October, 1705 (1 Smith's Laws, 45). This did not distinguish between the two kinds of attachments, foreign and domestic, which were separate remedies, as is clearly shown by "An Act to rectify proceedings upon attachments," passed March 2, 1723 (Ca. & Bio., Vol. I, p. 193). Domestic attachments were regulated by this act and by subsequent ones which altered it.

This statement is made by Judge Sergeant:

> "But the Acts of Assembly, relative to foreign attachments, although they are the foundation of that mode of proceeding, are imperfect. Much of the law on the subject, and most of the forms of proceeding, are borrowed from the proceedings under the custom of London, which the legislature took for their model in framing the act of 1705, and are now sanctioned by legal adjudications and by practice."

It may be said, following this quotation, that more than threescore years have elapsed since the last edition of Judge Sergeant's treatise was published, and only the changes by decisions and legislation justify this imperfect supplement to his learned and admirable book.

In the Sixth Report of Messrs. W. Rawle, T. I. Wharton

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[4] Drake on Att., sec. 3. 2 Shinn on Att., p. 2.

and Joel Jones, the able commissioners appointed to revise the Civil Code of Pennsylvania, there was submitted a draft of a bill entitled "An Act relating to the Commencement of Actions," which was adopted and passed June 13, 1836 (P. L. 568), Sections 43 to 78, inclusive, of this act related to foreign attachments. The procedure under the system provided by this well-drawn law prevailed for many years, unbroken by innovations. It is still followed, with some changes which will be noticed in their appropriate places.

The first inquiry is:

Against what persons may a foreign attachment be issued?

In the Doctrine and Practice of Foreign Attachment in the Mayor's Court, London, by Robert Woolsey, Gent. (1816), on p. 23, it is said:

"The process of attachment seems, therefore, in its origin, to have been originally intended merely to compel the appearance of the defendant by sufficient sureties to answer the plaintiff's demand upon him. It was justly considered that the merchants of a great mercantile city would have debtors resident in foreign countries with no means (unless by their property here), of rendering them amenable to our courts of justice. The process of attachment was, therefore, probably devised; and hence, in our common law books, it is styled Foreign Attachment. But it may be remarked, that in the language of the city courts, all non-freemen are styled foreigners."

The 44th Section of the Pennsylvania Act of June 13, 1836, is as follows:

"A writ of attachment in the form aforesaid[5] may be issued against the real or personal estate of any person not residing within this Commonwealth, and not being within the county in which such writ shall issue, at the time of the issuing thereof."

It appears from the Report of the Commissioners that the words "and not being in the county," were intended to save a creditor from making inquiries in all the counties of the state before issuing his writ; "also because it is not probable that he would be acquainted with the fact of the defendant's presence in a distant county; and if the fact

[5] The form is given in the 43d section.

were made known to him it would avail him little, since the defendant would probably have left the commonwealth before a writ could be served upon him under such circumstances" (Report of Comm., p. 158).

Hence, there appear two tests; non-residence of the defendant, and that he is not within the county at the time of the issuance of the process of foreign attachment against him.

By the 76th Section of the Act of June 13, 1836, a writ of foreign atachment may be issued against any foreign corporation, sole or aggregate. In pursuance of this provision, it has been held that a corporation incorporated in another state is foreign, even if it has complied with the statutes of Pennsylvania, which specify an office and an agent within this state, the filing of a statement with the Secretary of the Commonwealth showing the title and object of the corporation, the location of its office or offices, the name or names of its authorized agent or agents therein. The argument that the primary object of a foreign attachment, that is to compel the appearance of the defendant, may be accomplished by the service of a summons on the legally appointed agent was overruled in decisions of courts of common pleas. Although the statutes (*e. g.,* April 21, 1858, P. L. 403; April 22, 1874, P. L. 108) were of later date, the affirmative force of the 76th Section of the Act of 1836 was upheld. The authority relied upon is *Chase* v. *Ninth National Bank,* 56 Pa., 355. The following are some of the cases in the lower courts, viz.: *Pierce* v. *Electric Co.,* 28 W. N., 311;[6] *Beal & Simmons* v. *Toby Valley Supply Co.,* 13 C. C., 273; *Pain's Pyro Spectacle Co.* v. *Lincoln Park & Steamboat Co.,* 19 C. C., 21; *Diener* v. *Wopsononock Hotel Co.,* 23 C. C., 376.

It has been held that an absconding debtor who has left his place of residence within this commonwealth is not

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[6] Notice the briefs of counsel in this report.

Abbreviations in this article: "Pa.," Pennsylvania State Reports; "Sup.," Pennsylvania Superior Court Reports; "C. C.," Pennsylvania County Court Reports; "Dist.," Pennsylvania District Reports; "W. N.," Weekly Notes of Cases.

liable to foreign attachment. *Scott* v. *Hilgert,* 14 W. N., 305; *Labe* v. *Brauss,* 12 C. C., 255; *Sheldon* v. *Forsman,* 17 Lancaster Law Review, 85; *Shenk & Peters* v. *Hall,* Id., 114. In *Whitehill* v. *Eicherly,* 15 C. C., 593, it was held by the Common Pleas of Lancaster County that a foreign attachment may be issued against a debtor who has left the state for the purpose and with the intention of taking up a new domicile previously determined upon, although he has not arrived at the new domicile. Judge Sharswood, in Reed's Appeal, 71 Pa., 378, after stating the decision in *Pfoutz* v. *Comford,* 12 Casey, 420 (from the syllabus?), that a debtor does not become a non-resident so as to subject him to a foreign attachment, by leaving his place of abode in this state and going to another to seek a new residence, but continues a resident of the state until he has another place of abode with the intention of remaining in it, further said:

"This decision accords entirely with all the authorities. Mr. Justice Grier expressed it clearly and tersely in *White* v. *Brown,* 1 Wall. Jr., C. C. R., 264: 'A man cannot be considered as a vagabond or a person without any domicil, for the domicil of origin is not abandoned until a new one has been intentionally and actually acquired.' A domicil once acquired remains until a new one is acquired actually, *facto et animo*; the fact and intention must concur: Story of Confl. section 47."

When does an assignment for the benefit of creditors by a non-resident pass the title to his property in Pennsylvania, and what is the effect of the Act of May 3, 1855, Section 1, P. L., 415, which requires the recording of such assignments in the county where the real or personal estate of the assignor may be? The answer is given, with abundant citations, in a note in 2 Purdon's Digest—Stewart—p. 1903, P. L., 17, of which a copy is as follows:

(q) This act is for protection of the citizens of Pennsylvania alone, and citizens of another state or of a foreign country cannot take advantage of it, or secure a preference over other foreign creditors by an attachment here, though the assignment is not recorded here, at least when the assignment is duly recorded in the state where executed or the attaching creditor has had notice thereof: *Bacon* v. *Horne,* 123 Pa., 452, 1889; *Cross* v. *Smith,* 14 Pa. C. C., 36, 1891; *Long* v. *Girdwood,* 150 Pa., 413, 1892; *Wing* v. *Bradner,* 162 Pa. 72,

1894; *Hilliard* v. *Enders*, 196 Pa. 587, 1900; see *Deni* v. *Pennsylvania R. R. Co.*, 181 Pa. 525, 1897, affirming 19 Pa. C. C. 7, s. c., 6 D. R. 15, 1896. And this construction of the statute does not violate article iv, section 2, of the constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states:" *Hilliard* v. *Enders*, 196 Pa. 587, 1900. And its protection extends to creditors and purchasers only, and does not include the assignor, or any one who claims under him, *e. g.*, a second assignee: *Lewis* v. *Barry*, 72 Pa. 18, 1872; Smith's Appeal, 104 Pa. 381, 1884.

The question has been raised: Does not the 7th Section of the "Service" Act of July 9, 1901, P. L., 614, followed by the 17th Section of said act with the usual repealing clause, change the condition of the 44th Section of the Act of June 13th, 1836, viz.: "Not being within the county"?

The said 7th Section is in these words:

"*Seventh.*—The writ of foreign attachment may be served in the manner now provided by law, but the attachment shall be effective whether or not the defendant was in the commonwealth at the time the writ was issued or served."

The title to the Act of July 9, 1901, is in these words:

"An act relating to the service of certain process in actions at law, and the effect thereof, and providing who shall be made parties to certain writs."

It is submitted that the old provision recommended by the commissioners and embodied in the 44th Section of the Act of 1836 now maintains for the following reasons:

1. Mr. Justice Mitchell in *Park Bros. Co.* v. *Oil City, B. W.* 204 Pa., 457, in construing the Act of July 9, 1901, in the case of a suit against a corporation said after citing a prior section of the statute * * "These are the only portions of the act bearing upon the present inquiry, the others merely varying the allowable kinds of service under different circumstances. All of them relate solely to methods of service. No direct reference is made anywhere to the jurisdiction of the courts, nor is any such intent discernible in the title." To validate the conditions of the seventh section of the Act of 1901, would be in the words of Judge Mitchell on another point, "to turn an act whose title and plain general purpose relate solely to methods of service, into one making substantial changes in the jurisdiction of courts. * * * "

2. Does the above title of the Act of July 9, 1901, "Relating to service" express the actual change in jurisdiction? Is the provision of the seventh section constitutional under Art. iv, section 3, of the Constitution of Pennsylvania?

3. The Act of March 30, 1905, P. L. 76, seems to restore the provision "not being within the county in which such writ shall issue, at the time of issuing thereof"[7]

CAUSES OF ACTION IN FOREIGN ATTACHMENT.

Special statutes will be cited, but until a recent date, the writ, speaking generally, was issued only in actions *ex contractu*. This was clearly stated by Woodward, *J.*, in deciding that it would lie in account render, in *Strock* v. *Little*, 45 Pa., 416.[8] He said:

"Under the custom of London, all attachments are grounded upon actions of debt or detinue; but under our statutes, which, being remedial, are to be liberally construed, foreign attachments may issue in all actions sounding in contract where the plaintiff can swear to the amount claimed, or the court, upon a rule to show cause of action, can get at the sum in controversy wtih sufficient accuracy to fix the amount of bail which the defendant is to give to dissolve the attachments. * * * It will not lie in actions sounding in tort, for it was never designed as a remedy in such cases: *Porter* v. *Hildebrand*, 2 Harris, 131. Nor in actions *ex contractu* for unliquidated damages, for in such a case the court will have no standard by which to fix the amount of defendant's bail; but wherever, in actions *ex contractu*, the cause of action can be shown with such approximate precision as will enable the court to prescribe the amount of bail to the defendant, the writ may go."

The following extract from the opinion of Arnold, J.,[9] in *Snowden* v. *Fulford Planing Co.*, 19 C. C., 65, is an exposition of the Pennsylvania law on this point:

"Although nothing can be found in the civil code of June 13, 1836, which restricts the use of such writs to actions *ex contractu*, yet there are decisions of the Supreme Court, based on earlier statutes, which decided that a writ of foreign attachment cannot be lawfully issued in an action for a tort. See *Jacoby* v. *Gogell*, 5 S. and R., 450, A. D. 1820; *Porter* v. *Hildebrand*, 14 Pa., 129; *Boyer* v. *Bullard*, 102 Pa., 555, A. D. 1883. The first of these cases, *Jacoby* v. *Gogell*, was decided before the Act of 1836, and Tilghman, C. J.,

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[7] See *Lopez* v. *Donohue*, 15 Dist. Rep., 349.

[8] See the remarks of Judge Sharswood on *Strock* v. *Little* in *Knerr* v. *Hoffman*, 65 Pa., on p. 129.

[9] It is a very inadquate tribute to Judge Arnold's memory to add these words: He was a genial friend, an upright judge, a lovable man. He considered and discussed questions of practice with ardent interest and his clear and learned opinions are of great value to those who study them.

based his decision on the 'Act about attachments,' passed in 1705 (1 Sm. Laws 45), which in its preamble stated that the laws of this government might have been deficient in respect of a attachments for 'debts contracted or owing within this province.' The Act of March 2, 1723 (1 Sm. Laws 158), requires the plaintiff to make oath that the defendant is 'indebted' to him before the writ shall be issued; and the Act of September 28, 1789 (2 Sm. Laws 502), treats of the 'debt, claim or demand' of the plaintiff, from which the conclusion is deduced that only actions *ex contractu* can be commenced by a writ of foreign attachment. Further discussion of this subject, and an interesting and instructive analysis of the early statutes and decisions in this and other states, and also in England, may be found in *Redwood* v. *Consequa,* 2 Browne, 62, by Judge Hemphill; and *Fisher* v. *Consequa,* same book, in the appendix, p. 28, and 2 Wash. C. C. R., 382. Inferential argument in favor of this conclusion may be found in the Act of May 15, 1874, P. L. 183, allowing the issue of such writ against any person who, being a resident of this commonwealth, shall have removed therefrom after having become liable in an action *ex delicto.*

It is sometimes said that unliquidated damages arising *ex contractu* are not recoverable in an action commenced by a writ of foreign attachment, but this is too broad a statement. Such damages are so recoverable if they are capable of being reduced to a certainty by any fixed standard, as where the damages depend on the value or amount of goods produced or sold and a share of the proceeds or commissions for selling the same are claimed; but damages for the loss of the advantages of the arrangement cannot be so recovered: *Carland* v. *Cunningham,* 37 Pa. 228, an action between the plaintiff and defendant."

There are three statutes which authorize writs of foreign attachment in cases of tort.

An Act of April 6, 1870, P. L., 960, applies only to Philadelphia. It provides that in all cases of arrest for homicide, or for assault and battery resulting in great bodily harm to the person assaulted, so that life is imperiled, wherein the person arrested shall be held to bail and shall make default whereby his recognizance shall be forfeited, and shall flee the jurisdiction of the court, it shall be lawful for the person injured, his or her executors or administrators, to begin his, her or their action for damages by filing in the proper court an affidavit that the defendant has left, or is about to leave the jurisdiction of the court; whereupon the court shall award an attachment which shall have the same effect and proceedings as in cases of foreign attachment. It is said in 1 Br. Prac., Section 101, that this act was to meet a peculiar case.

An Act of May 15, 1874, P. L., 183, amended the 44th Section of the Act of June 13, 1836, to allow the issuing of

the writ of foreign attachment in all cases wherein any person, who, being a resident of this commonwealth, shall have removed therefrom, after having become liable in an action *ex delicto*. No writ shall be issued in such a case except upon oath or affirmation, previously made by the person having such right of action *ex delicto,* or by someone in his behalf, of the truth of the claim and of the facts upon which such attachment shall be founded, as well as that he verily believes that the person has removed to escape service of process to answer for such alleged tort; which oath or affirmation shall be filed of record. The proceedings subsequent to the issue of the writ shall be the same as in other foreign attachments.

The latest act, which amends the above 44th Section of the Act of 1836, is that of March 30, 1905, P. L., 76, and is as follows:

"A writ of attachment, in the form aforesaid, may be issued against the real or personal estate of any person not residing within this commonwealth, and not being within the county in which such writ shall issue, at the time of the issuing thereof, *in all actions* ex contractu *and in actions* ex delicto *for a tort committed within this commonwealth.*"

The first of these statutes, local in its scope, has not often been invoked, nor has the second or third. All are opposed to the origin, the theory and the practice of foreign attachment, but the last can afford the means of cruel oppression and injustice by tying up all of a non-resident's estate, which is within the limits of Pennsylvania (perhaps all that he owns), upon process which need not be supported—even by the *ex parte* preliminary affidavit of the claimant. The amount of bail named in the *praecipe* and writ is not required to be based upon any statement of the facts and circumstances of an alleged wrong, active or by negligence, of the defendant, or of any details on which to reach some measure of damages. The interests of the absentee are imperiled according to the caprice or malice or speculative craving of the plaintiff. Few cases are found in our Reports to show judicial interpretation of this act in substance, or in procedure.

An Act of May 23, 1887, P. L., 163, allows foreign attachment in *Equity*.

It provides:

"In any case in which a bill in equity may hereafter be filed against a defendant or defendants, not residing in the State of Pennsylvania, in which there shall be included a prayer of a decree for the payment of money, it shall be lawful for the plaintiff to cause a writ of foreign attachment to be issued against the real or personal estate of such defendant or defendants, in the following form." (Form of writ is given.)

The second section of the act provides for entry of a decree *pro confesso* against defendants who do not appear and answer the allegations of the bill at or before the first Monday of the third term next ensuing after the issuing of the attachment and subsequent proceedings, in the same manner as in foreign attachment in actions at law.[10]

Vessels. An Act of April 28, 1899, P. L., 102, provides in the first section:

"The right to commence an action by writ of foreign attachment shall extend to all actions, whether in tort or contract, against the owners, master or crew of vessels, or other structures upon navigable waters, for injuries caused to persons or property on land by such owners, master or crew, or their employes, in navigating or operating such vessels or structures, or in carrying on any work upon such vessels or structures."

The second section provides for the same proceedings as in foreign attachment.

The third section provides that when the vessel or structure goes beyond the limits of the commonwealth within thirty days after the cause of action arises, any limitation of time prescribed by law for bringing the action shall commence to run only from the time of the return of said vessel or structure to the Commonwealth.

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[10] The writer has not found any opinions reported which interpret this statute. There are two C. P. cases in the by-reports, *Stewart* v. *Parnell,* 8 C. C., 604, and *Crowe* v. *Davis,* 33 W. N. C., 552, the first to the effect that the attachment will not be dissolved on the filing of a formal answer, and the second that in an action of account render, brought by foreign attachment the plaintiff was given leave to file a bill in equity with the same effect as if the proceeding had originally been begun by bill in equity.

So far as reported cases go, this seems to be an unused statute.[11]

In support of the foregoing comment of the present writer upon the statutes which authorize foreign attachments [12] in tort, he quotes on the extension of the use of this proceeding an extract from the opinion of Judge Sharswood in Coleman's Appeal, 75 Pa., 441 (1874). He was a jurist, who, in addition to his great ability and learning, so widely recognized, had a long experience in the practical administration of commercial law. He said, page 457:

"It will be seen from this brief review that it has not been the policy of our jurisprudence to bring non-residents within the jurisdiction of our courts unless in very special cases. In proceeding against them for torts, even property belonging to them cannot be reached by process, and in cases of contract, nothing but the property can be affected unless the defendant voluntarily appear and submit to the jurisdiction. We may congratulate ourselves that such has been the policy, for nothing could be more unjust than to drag a man thousands of miles, perhaps from a distant state, and in effect compel him to appear and defend under the penalty of a judgment or decree against him *pro confesso.*"

SALE OF PROPERTY BEFORE JUDGMENT.

When the goods attached are of a perishable or chargeable nature, the court, on the same being shown, will on motion, order them to be sold. The proceeds in such a case are paid into court, and the plaintiff cannot have an order to take the same out of court, until after final judgment against the garnishee. *2d Tr. & H. Prac., Sec. 2276.* But when sold, the title of the purchaser is indefeasible and unquestionable, *Megee* v. *Beirne,* 39 Pa., 50. Rule 20, Sec. 1 of the Courts of Common Pleas of Philadelphia is:

"No order shall be made for the sale of property seized on a writ of foreign attachment, unless the plaintiff or some other person acquainted with the facts, shall make affidavit that the demand of the plaintiff is just."

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[11] Qu. Was this act passed to cover some particular case?

[12] Which comment is of little moment, coming from him alone.

PROCEEDINGS.—*I. Attachment of Personal Property.*

The writ prescribed by statute is of this form:

COUNTY OF PHILADELPHIA, *ss.*: *Foreign Attachment.*

THE COMMONWEALTH OF PENNSYLVANIA,

To the Sheriff of the County of Philadelphia, GREETING:

WE COMMAND YOU, that you attach defendant late of your county, by all and singular goods and chattels, lands and tenements, in whose hands or possession soever the same may be, so that be and appear before our Court of Common Pleas, No of the County of Philadelphia, to be holden at Philadelphia, in and for the said County, on the first Monday of next, there to answer plaintiff of a plea of assumpsit, &c.

AND ALSO, that you summon as garnishees, all persons in whose hands or possession the said goods and chattels, lands and tenements, or any of them, may be attached, so that they and every of them, be and appear before our said court, at the day and place aforesaid, to answer what shall be objected against them, and abide the judgment of the court therein. And have you then and there this writ.

WITNESS the Honorable President Judge of our court at Philadelphia, the day of in the year of our Lord, one thousand nine hundred and

Prothonotary.

(Endorsed) Term, 190

COURT OF COMMON PLEAS, No.

Foreign Attachment.

Bail, $

Attach goods and chattels, lands and tenements, moneys, credits, legacies and interests of the defendant in the hands, possession or control of and summon as garnishee.

This is returnable to a term return day. In Philadelphia, it is also called a "Quarterly" return day; but Judge Thayer decided in *Taylor* v. *Tantum,* 18 *Phila.,* 414, that by Section 32 of the Act of June 13, 1836, P. L., 578, the writ may be made returnable to a return day of an intermediate month. It need not be issued ten days before the return day. Warner's Appeal, 13 W. N., 505.

The writ is obtained upon filing a *praecipe,* which may be like this:

J. W. C.
v.
A. B. K.
Prothy., C. P.

Issue writ of Foreign Attachment in Assumpsit or Trespass, returnable the Monday of 190 .
Bail $

The Sheriff will attach goods and chattels, lands and tenements, moneys, credits, legacies and interests of the defendant in the hands, possession or control of A. B., C. D., E. F. and of any other person or persons and summon the said A. B., C. D., E. F. and such other person or persons as garnishees.

A. H.,
Atty, for Plaintiff.

This copy of an old form is interesting.

"Praecipe in Foreign Attach:

C. M. C.
v
D. M. B. } D. C.

March Term, 1843, No. 7.

Issue Foreign Attachment Case Bail or deposit $6000. Rettle to 1 Mon. March, 1843
To attach goods, chattels, credits and effects in the hands of M. B. & Co. and summon them as garnishees.

E. K. P.,
for Plff.

E. C. Dale, Esq.,
P. D. C.
December 22, 1842.

Observe that in the tort cases under Acts of 1870 and 1874, *supra,* an affidavit is required. It would also seem to be good practice to file a preliminary affidavit in cases of tort under the Act of March 30, 1905.

The writ of foreign attachment is filled up, signed and sealed in the prothonotary's office and taken to the sheriff for service. That officer protects himself by taking from the plaintiff a bond with sureties.

THE BOND.

At this point it should be noted that there exists, apparently never repealed, legislation for Allegheny County (Act of May 19, 1871, P. L., 986), and for Philadelphia County (Act of April 10, 1873, P. L., 776), which relieves the

sheriff in those jurisdictions from responsibility for the acceptance of sureties. These statutes require that all bonds given to the sheriff in his official capacity, as indemnity for executing the writs therein named (foreign attachments, *inter alia*), shall be justified before the judge of the proper court (before the prothonotary in Allegheny County), and when the prothonotary shall certify said justification and approval to the sheriff, the bond shall become the property of the successful party to the suit without recourse to the sheriff, who may have executed said process or received said bond as indemnity.

This form of affidavit and approval of sureties is used in Philadelphia:

..... }
v.
..... }

Court of Common Pleas, No. .....
Term, 19..... No.....
Surety for .....
Amount of Property Secured, $.....
Penal sum of bond, $ .....

.....being about to become surety in the above entitled case, and being duly ..... according to law deposes and says:

1st. I reside at .....and my occupation is .....

2d. I am the owner of real estate in the County of Philadelphia as follows: .....
.....

3d. The value of said real estate is $..... and the rent ..... It is assessed for the purpose of taxation, at the value of $..... and is so assessed in my name.

4th. There are ..... incumbraces against the said real estate as follows: .....
..... and there is no other judgment binding the said land or mortgages, ground rent or other incumbrance of any kind, except those above named.

5th. The title to the said real estate is in my own name, and the same is not subject to any trust.

6th. I obtained the said real estate in ..... by ..... from ..... and my deed therefor is recorded.

7th. There are ..... judgments against me.

8th. I am not surety in any other case, or for any public officer.

(Signature of Surety) .....

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[13] Failure to insert bail in præcipe not fatal, when defendant not prejudiced by the omission. See *Wallace* v. *Scholl*, 9 Sup., 284.

Sworn and subscribed before me .....190 ....
..... Prothonotary.

[14] Notice of application for approval of this surety was given to .....by writing on the ..... day of .....190 .....
Attorney for.....

The above-named deponent is approved as surety in the above case.

The bond in Philadelphia is in this form:

KNOW ALL MEN BY THESE PRESENTS, That we (Sureties approved by the Court) (Hereinafter called Obligors) are held and firmly bound unto Esquire, Sheriff of the City and County of Philadelphia, in the just and full sum of dollars, lawful money of Pennsylvania, to be paid to the said Esquire, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made and done, we do bind ourselves and each of us, our heirs, executors and administrators, and every of them, jointly and severally, firmly by these presents. Sealed with our seals, dated this day of in the year of our Lord one thousand nine hundred

THE CONDITION OF THIS OBLIGATION IS SUCH, That whereas, in and by a certain writ of attachment issued out of the Court of Common Pleas, No. for the County of Philadelphia, tested at Philadelphia, the day of 190 , commanding the said Sheriff that he should attach (Hereinafter called Defendant) by all and singular goods and chattels, lands and tenements, in whose hands or possession soever the same might be found in his bailiwick, &c., to answer (Hereinafter called Plaintiff) in a plea of assumpsit (Term, 190 , No.), which said writ is returnable the Monday of now next ensuing.

AND WHEREAS, The said Sheriff does not certainly know what are the goods and chattels of the said Defendant : Now if the said Obligors, their heirs, executors and administrators, shall and will save harmless and keep indemnified the above-named Sheriff, as aforesaid, and his Officers, and every of them, and his and their heirs, executors and administrators, and every of them, and his and their goods and chattels, lands and tenements, of and from all manner of suits, action and actions, damages, costs and charges whatsoever, that shall or may accrue to him or them, for or by reason of his or their executing the said writ; and if the said Plaintiff shall and will prosecute said plea against the said Defendant with effect according to law, and abide the judgment and award of said Court, that then the above obligation to be void and of non-effect, otherwise to be and remain in full force and virtue.

Sealed and delivered
in the presence of us:

(L. S.)
(L. S.)

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[14] Obviously, this notice cannot be required in for. att.

Notice the statement by Smith, *J.*, in *Clement to use, etc.*, v. *Courtright*, 9 Sup., 45, which was a futile attempt of a successful defendant in a foreign attachment to recover as assignee of the sheriff upon the bond of indemnity which had been given by the plaintiff and his sureties. This is the construction placed upon the bond:

"The purpose of the bond, as shown by the terms of the condition, and the preceding recital, was manifestly the protection of the sheriff and his officers, and there is nowhere anything to indicate that any protection to the defendants in the attachment was contemplated. Its condition, undoubtedly, embraced any liability which the sheriff incurred through the plaintiff's failure to prosecute with effect * * *."

SERVICE OF THE WRIT.

It is said in Troubat & Haly's Practice, Vol. II, Section 2261, that "the plaintiff's attorney sees that a description of the specific effects or property to be attached is indorsed by the prothonotary on the writ."

This is believed not to be the usual practice, but directions are given to the officer who serves the attachment, and in some way the goods and chattels should be pointed out by the plaintiff, or by someone in his behalf.

The sheriff may also summon as garnishees the persons who hold property or effects of the defendant, though such persons are not named in the writ.

The 48th section of the Act of June 13, 1836, provides:

"In the case of personal property, the attachment shall be executed as follows, to wit: The officer to whom such writ shall be directed, shall go to the person in whose hands or possession the defendant's goods or effects are supposed to be, and then and there declare, in the presence of one or more credible persons of the neighborhood, that he attached the said goods or effects."

The 50th Section is:

"The goods and effects of the defendant when attached in the hands of the garnishee, shall, after such service, be bound by such writ, and be in the officer's power, and if susceptible of seizure or manual occupation, the officer shall proceed to secure the same to answer and abide the judgment of the court in the case, unless the person having the possession thereof will give security therefor."

The sheriff's return should show all the essentials of service.

It was said in the *per curiam* opinion in *Hayes* v. *Gillespie,* 35 Pa., 155:

"In so severe a proceeding as a foreign attachment, we cannot doubt that the prescribed form of serving the writ, in order to attach real estate, must be strictly pursued."

This was approved, together with the opinion of Judge Sharswood, in *Lambert* v. *Challis,* in the old District Court of Philadelphia (in the note in 35 Pa., 156), in *Vandergrift & Forman's Appeal,* 83 Pa., 126, and *Byran* v. *Trout,* 90 Pa., 492. To the same effect is *Sterrett* v. *Howarth,* 76 Pa., 438.

These were attachments of real estate, but it may be asserted broadly, if an act prescribe the manner of making service of a writ in terms that are not merely directory, the provisions of the statute must be followed. Whether they have been or not (*i. e.,* is the service valid or defective?), must be decided by the court out of which the writ issued, and how can the court judge of the sufficiency of the service unless the doings of the sheriff in executing the writ are set forth in his return?

That the sheriff need not insert in his return the words of the 50th Section of the Act of June 13, 1836, above quoted, was decided in Jaffray's Appeal, 101 Pa., 583, which is a leading case on service of foreign attachments. The following summary by Judge Arnold in *Wanamaker* v. *Stevens,* 1 Pa. C. C., 317, is made with his usual care:

"The sheriff may, no doubt, make what is called a copy service of the writ on the garnishee, so as to bind a debt due by the latter to the defendant: *Morgan* v. *Watmough,* 5 Whar. 125; or even goods of the defendant in the garnishee's possession, so as to make the garnishee the bailee of the sheriff; the seizure being made in the manner in which it is made in the case of a levy under an execution: Jaffray's Appeal, 101 Pa. St. 583. But the plaintiff and the sheriff cannot, by a mere copy service of the writ, escape the risks of the attachment, when the defendant's title is disputed, and throw them all upon the garnishee, by requiring him to retain the goods to abide the result of the suit; in that case the sheriff must demand indemnity from the plaintiff and seize the goods: *Shriver* v. *Harbaugh,* 37 Pa. St. 339. A declaration of the attachment in the preesnce of one or more credible

witnesses of the neighborhood is, however, indispensable; *Penna. R. R. Co.* v. *Pennock,* 51 Pa. St. 244, decides this emphatically. It would be vain to discuss the reason or the wisdom of this requirement of the statute; it is enough for us to say that it is so written in the law."

This extract from the opinion of Morrison, *J.,* in *Munis* v. *Oliver,* 24 Sup. Ct., 64, may be added:

"In Jaffray & Co.'s Appeal, 101 Pa. 583, it was held that it was not necessary for the sheriff to take the goods into his custody to execute his attachment so as to bind the goods, that the levying and attachment may be done without either handling the goods or taking them into possession, and the property fully bound by it and be in the officer's power and the owner's possession thereby divested."

The proper practice where the sheriff's return is defective, is to set aside the return and the rule to show cause why it should not be set aside it seems may be taken either by the defendant or the garnishee.[15] *Wanamaker* v. *Stevens, supra.*

Observe: "The practice of setting aside service on rule has the sanction of precedents sufficient to prevent it from being pronounced irregular in cases where it reaches the desired end without inconvenience or injustice to either party. See *Parke* v. *Commonwealth Ins. Co.,* 44 Pa. 422; *Hagerman* v. *Empire Slate Co.,* 97 Pa. 534; *Hawn* v. *Penna. Canal Co.,* 154 Pa. 455; *Fulton* v. *Commercial Travelers' Accident Asso.,* 172 Pa. 117; *Bailey* v. *Williamsport, etc. R. R. Co.,* 174 Pa. 114; *Platt* v. *Belsena Coal Mining Co.,* 191 Pa. 215 and *Jensen* v. *Phila. M. & S. Ry. Co.,* 201 Pa., 603." Mr. Justice Mitchell in *Park Bros.* v. *Oil City, B. W.,* 204 Pa., 453.[16]

GARNISHEE.—*Who may be made, who may not be made garnishee?*

In general terms it may be said: (1) The garnishee must have possession of the personal property of the defendant, or (2) he must be liable, *ex contractu,* to the defendant, whereby the latter has, at the time of the service of the attachment a cause of action, present or future, against the garnishee. Some particular examples may be noticed. Thus, it has been held that a foreign corporation, qualified to do

[15] The effect of an appearance by the defendant and also the duty of the garnishee to the defendant will be hereafter considered.

[16] For an interesting discussion of the case of a foreign attachment laid by a "creditor-debtor" on money or property in his own hand. See 2 Tr. and H. sections 2283-2284.

business in Pennsylvania by compliance with the statutes (*e. g.,* Act of April 22, 1874, P. L., 108) for registration, appointment of agent—*et id omne*—can be summoned as garnishee.[17] *Barr* v. *King,* 96 Pa., 485; *Datz* v. *Chambers,* defendant, *& National Fire Ins. Co.,* garnishee, 14 C. C., 643. A municipal corporation cannot be made garnishee. *Erie* v. *Knapp,* 29 Pa., 173. Judgment against such a corporation cannot be enforced by ordinary execution. *Monaghan* v. *The City,* 28 Pa., 207; *in re Sedgeley Avenue,* 88 Pa., 509. All counties are exempt, and also public officers in regard to whom "considerations of public policy and convenience require that money in their hands should not be stopped while *in custodia legis.*" Thayer, *J.,* in *Davies* v. *Gallagher,* 16 W. N., 147. So an official, whose duties are prescribed and regulated by law cannot be garnisheed in respect to property held by him in his official capacity, unless authorized by statute; *e. g.,* receivers, assignees, trustees.[18] In such a case, if there were statutory permission, judgment against the garnishee would be withheld if necessary for his protection, until the opinion of the court which appointed him could be obtained upon the propriety of the payment to the attaching creditors. *Conshohocken Tube Co.* v. *Iron Co.,* 167 Pa., 592.[19]

WHAT MAY BE ATTACHED.

While the plaintiff's claim against the defendant must be presently demandable, the claim of the defendant against

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[17] As to service on foreign insurance companies see opinion of Thayer, *J., Busch* v. *World Mutual Benefit Asso.,* 16 C. C., 361, under section 13 of Act of April 14, 1873, P. L. 27, amended by the Act of June 20, 1874, P. L. 134. See also *Kennedy* v. *Insurance Co.,* 165 Pa. 179.

[18] Limited space prevents further instances of those exempt from being made garnishees, but a long list with citations of authorities may be found under note C on pp. 1536 and 1537 in Second Purdon's Digest (Stewart), *q. v.* These are under the statute relating to attachments *sur* judgment, but that proceeding, so far as the status of a garnishee is concerned, and indeed in other respects, is closely analogous to foreign attachment.

[19] See Act of Congress of August 13, 1888. (U. S. Stat. at Large, 436.)

the garnishee need not be due. *Coaks* v. *White,* 11 W. N. 271. The plaintiff may recover money or goods which may come into the hands of the garnishee at any time after the service of the writ. *Sheetz* v. *Hobensack,* 20 Pa., 412, in which Lewis, *J.,* cites *Silverwood* v. *Bellas,* 8 Watts, 420, to show that an attachment was held to bind a sum of money which had been placed by an attorney in the hands of the garnishee as a mere messenger to convey to the debtor three years after the service of the writ of attachment. See *Mahon* v. *Kunkle,* 50 Pa., at p. 218, and *Hays* v. *Lycoming Ins. Co.,* 99 Pa., at p. 625. But if the statute requires a "seizure" of the goods in the service of the writ of attachment, as shown by Thompson, *J.,* in *Penna. R. R.* v. *Pennock,* 51 Pa., 244, and sustained as meaning at least such a seizure as is made by a sheriff on execution as stated in the opinion of Gordon, *J.,* in Jaffray's Appeal, 101 Pa., 583, it is difficult to see how the foreign attachment can bind the goods and chattels which are not in the hands of the garnishee when the writ is served, but subsequently come into his hands. Is there not a distinction between money and debts on the one hand and tangible personalty on the other hand? The Act of April 12, 1855, P. L., 213, that carriers shall not be made liable as garnishees with respect to goods *in transitu,*[20] and at the time of the service of process beyond the limits of this commonwealth, may be argued not to be an admission of previous liability, but to be in accord with the 44th Section of the Act of June 13, 1836. Wages, under the Act of April 15, 1845, P. L., 459, are exempt from foreign attachment. *Box Board Co.* v. *Rossiter,* 30 Sup., 23.

Debts payable in future, debts in suit, unsatisfied judgments, contingent liabilities, rents, money deposited in bank,

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[20] See reference in *Penna. R. R.* v *Pennock, supra,* on pp. 253 and 254 to *Digby* v. *Childs,* 12 Harris, p. 23. The question is discussed by Judge Thompson as to goods not within the county in which the writ of foreign attachment is issued.

unliquidated claims, may be attached, and goods "pawned, pledged and demised."[21]

By the Act of July 27, 1842, P. L., 436, legacies, devises and interests in decedents' estates are subject to attachment by any creditor of the legatee, devisee, or person having an interest (except legacies and distributive shares of married women; which, however, are attachable under Act of April 11, 1848, Sec. 6, P. L., 536; *Evans* v. *Cleary,* 125 Pa., 204. See Act of June 8, 1893, Sec. 3, P. L., 344). It was said by Reed, *J.,* in *Lorenz's Administrators* v. *King,* 38 Pa., 93:

> "In *Sinnickson* v. *Painter,* 8 Casey 384, we determined that a foreign attachment will lie against a legacy or distributive share before any settlement of the estate of a decedent; and that it is in the power of the court to mould the judgment against the executor or administrator into such form that no injustice shall be done to any one."

Observe that a foreign attachment will not lie against the representatives of a deceased person for the debt of the latter. See cases cited by Paxson, *J.,* in *Williamson* v. *Beck,* 8 Phila., 269. To allow it would interfere with the distribution of estates prescribed by law.

While the common pleas has jurisdiction in the attachment case; on the other hand, if a creditor of one entitled to a legacy or distributive share of an estate attach the executor or administrator of such estate, the orphans' court will suspend actual distribution pending the determination of the attachment in the court of common pleas from which it is issued. This practice is indicated in *Del Valle's Estate,* 17 W. N., 30; *Buckius' Estate,* 17 C. C., 270. See *Fitler's Estate,* 14 W. N., 62. As it is frequently said, the attachment is an equitable assignment; as against the garnishee, the attaching creditor stands in the shoes of his debtor.

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[21] See for examples, P. & L. Dig. Dec. Vol. 8, cols. 12422, *et seq.* Also 1 Tr. & H. Pr. sections 1181, 1186.

The Rule on Plaintiff to Show Cause of Action and the Rule to Quash.

If the writ of foreign attachment has been legally served, the defendant or the garnishee may have a rule of course on the plaintiff, which may be thus taken:

C. P. No.

v. Term,

No.

For. Att., Assumpsit (or Trespass)

Prothy., C. P.

Enter a rule on the plaintiff to show cause of action and why the above attachment should not be dissolved, returnable (to the next rule day, specifying it).

X. Y.,

Atty. for , Garnishee.

(or E. F., Atty. for defendant.)

It is a step on thin ice for the defendant to take this rule in Philadelphia County, where he is not allowed to appear *de bene esse*. While the Rule of Court [22] is that "appearances shall be by a written order endorsed and filed in the prothonotary's office," it has been held that when a "defendant entered a rule on the plaintiff to show cause of action and why the attachment should not be dissolved, signing the *praecipe* or order with his name as counsel for defendant," and the rule was discharged, this was an appearance by the defendant. The general statement was made by Arnold, *P. J.*, in *Ruhland to use, etc.*, v. *Alexander*, 19 C. C., 577, thus:

"A defendant cannot be in and out of his case at his pleasure. When he appears for any purpose he is in court for all purposes, whether for his advantage or disadvantage; he is affected with actual notice and is subject to all the consequences and entitled to all the benefits thereof."

Before a general appearance, the defendant or the garnishee may move to quash the writ, or have a rule on plain-

[22] Rule 30, section 1.

tiff to show his cause of action and why the attachment should not be dissolved, but such right is waived by appearance. *Borough of Lansford* v. *Jones,* 5 Dist., 483, and cases there cited; *Black* v. *Brown,* 31 C. C., 639. Just in what way a defendant can, of his own motion, get the benefit of the rule on the plaintiff to show cause of action and yet avoid the risk of appearing generally in the suit, in counties where no appearance *de bene esse* is permitted, is not apparent, if full force be given to the words of the opinion in *Ruhland* v. *Alexander.* It is true that the course advised in *Pain's Pyro Spectacle Co.* v. *Lincoln Park & Steamboat Company.,* No. 2, 19 C. C., 23, *i. e.,* to request the garnishee to enter the rule, which the garnishee "may do, according to *Penna. R. R. Co.* v. *Pennock,* 51 Pa., 244;[23] and *Melloy* v. *Deal,* 124 Pa., 161; and should do so, according to *Baldy* v. *Brady,* 15 Pa., 103, and *Bank of Northern Liberties* v. *Munford,* 3 Grant, 232." These four cases did not arise upon the rule to show cause of action now under consideration, though the language of Coulter, *J.,* in 15 Pa., on p. 108, is broad: "But Baldy, the garnishee, was bound to make every just and legal defence which they * * * can make, or be answerable to them for the fund," and this is approved in *Bank* v. *Munford.* Judge Reed makes this general declaration: "It is true, a garnishee is bound to make every legal defence that a claimant of the fund might make.—3 Harr. 103" (*Baldy* v. *Brady*). Perhaps the effort to compel the plaintiff to show a sufficient cause of action by affidavit may be included in "every legal defence;" but if the garnishee be not so advised, or if he be in collusion with the plaintiff, the defendant cannot have the benefit of the prompt discovery which this old and well established rule should give him. There ought to be in courts which prohibit appearances, *d. b. e.,* some valid mode of appearing conditionally, *pro hac vice,* by which the attorney for an absent defendant would ascertain and get of record the averments of the plaintiff's claim. In counties where an

[23] As to right of garnishee, see *Gibney* v. *Pennsylvania Motor Car Co.,* 29 C. C. 651. Why not take the rule on his own behalf?

appearance *de bene esse* has not been abrogated, by rule of court, such a provisional appearance appears to be valid for the purpose of testing the plaintiff's right, on his own allegation, to the foreign attachment. It was adopted in *Lindsley* v. *Malone,* 23 Pa., 24, and is mentioned by Mr. Justice Mestrezat, without criticism, in *Bellah* v. *Poole,* 202 Pa., 71. While an appearance *d. b. e.* is conditional, if the writ be returned served it becomes general, unless on or before the return the attorney enters a *retraxit.*[24] Duncan, *J.,* 11 S. & R., 87. Yet, in a foreign attachment, the essential factor of which is the absence of a non-resident defendant, this qualified and limited appearance ought to be available. Further, uniformity in procedure throughout all the courts of common pleas of the state, as far as may be practicable, is desirable. The rule stated in *Turner* v. *Larkin,* 12 Sup., 284, "that a party may appear specially for the purpose of stating an objection without waiving it," clears up the difficulty on a rule to quash, even when appearance *d. b. e.* is forbidden by local court rule. Why not extend it to the case of a rule to show cause of action?

It has been stated that the plaintiff ought to file the affidavit of cause of action before the writ issues, but no decision to that effect has been found. The affidavit is only compellable by rule.

Perhaps these notions may be profitless, and it is well to turn from them and give due weight to these sentences from the opinion of Rice, *P. J.,* in *Nicoll* v. *McCaffrey,* 1 Pa. Sup., 187:

"The court will inquire into the cause of action on foreign attachment in the same manner as on a capias where the defendant's person is taken into custody, and for similar reasons, and will proportion the bail according to the justice and extent of the plaintiff's demand, or if no sufficient cause of action be shown the court will discharge the

[24] Notice a curious reverse position in *Everett* v. *Niagara Ins. Co.,* 142 Pa. 322, the case of appearances *de bene esse* by a defendant to set aside the return of service of the summons and after it was set aside the entry of a *non-pros.* on motion of defendant's counsel in default of a declaration filed by plaintiff within one year. Defendant was not in court. The entry of the non-suit was unauthorized. See opinion of Mr. Justice Mitchell on p. 330.

property from the attachment. Serg. on Foreign Att. 138, etc. The well settled practice on a rule to show cause of action is for the plaintiff to read his affidavit, and if that is sufficient the attachment will be allowed to stand. Counter affidavits tending to contradict the plaintiff, or setting up a defense to the action, are not read on the hearing of such rule, for the reason that it would tend, in practice, to a trial of the case by the court in advance."

The Weekly Notes of Cases, District Reports and County Reports, and local by-reports furnish abundant illustrations of the judicial interpretations of such affidavits and disposition of such rules. Out of the number it is thought that not one is more valuable, or more correctly states valid propositions than the opinion of Lindsey, *P. J.*, in *Sperry* v. *Ollie,* 32 C. C., 71, from which the following quotation is taken. Upon a rule on plaintiff to show cause of action and to dissolve a foreign attachment, the plaintiff asked leave to file a paper entitled "Amendment and Supplement to Plaintiff's Claim," to which it was objected that the plaintiff has no right to amend or supplement an affidavit of cause of action on foreign attachment:

"After argument this question was reserved for consideration with the question of the sufficiency of the plaintiff's statement as showing a cause of action.

The plaintiff has made no response to the rule on him to show cause of action, nor has he filed an affidavit of cause of action in accordance with the established practice. True, he has sworn to his statement of cabin, and we may perhaps treat it as an affidavit of cause of action. But if we so treat it, he cannot be allowed to amend it. *Eldridge* v. *Robinson,* 4 S. &. R. 548; *Talhelm* v. *Hoover,* 4 Pa. C. C. R. 172; *Shumway* v. *Webster,* 24 W. N. C. 336; *Sagee* v. *Rudderow,* 1 Pa. C. C. R. 373; *Jacobs* v. *Tichenor, 27* W. N. C. 35.

There are a few cases in which amendments have been allowed.[25] But the great weight of authority is against allowing them, and we think there are paramount reasons for not allowing them. The question then is, does the plaintiff's statement show a cause of action in such explicit terms as the law requires?

The plaintiff must show such a cause of action, as would, prior to the abolishment of the acts for imprisonment for debt, have entitled him to hold the defendant to special bail; *Doane's Amrs.* v. *Penhallow,* 1 Dallas, 218.

"An affidavit filed in answer to a rule to show cause of action in foreign attachment, should be explicit and state in positive language, and with due particularity the circumstances constituting the ground of the plaintiff's demand." *McCulley* v. *Chisholm,* 19 Phila. 337.

"There is no reason why an affidavit in a foreign attachment should not be as strict as one to procure bail." *Mollet* v. *Fonsera,* 4 S. & R.

[25] See *Hallowell* v. *Canning Co.,* 16 Sup., 60.

543. In the following cases the affidavits were held insufficient: *Graham* v. *Canton & W. R. R. Co.*, 25 W. N. C. 65; *Insurance Co.* v. *Walker*, 1 Phila. 104; *Shumway* v. *Webster*, 24 W. N. C. 336; *Sagee* v. *Rudderow*, 1 Pa. C. C. R. 373; *Talhelm* v. *Hoover*, 4 Pa. C. C. R. 172; *Jacobs* v. *Tichenor*, 27 W. N. C. 35."

The learned judge further cites from the last case Judge Thayer's statement:

"An affidavit on which a foreign attachment is granted stands upon the same footing as an affidavit to hold to bail, and is subject to the same rules, including the rule that it can never be helped by a supplemental or amended affidavit.[26] This is the well settled law. If there have been aberrations from it by inferior courts at any time, we are not disposed to follow them, or to be led astray from it by false lights."

Care should be taken by plaintiff's counsel in preparing his affidavit. It should set forth the facts essential to the jurisdiction of the court to compel appearance by foreign attachment; *Hallowell* v. *Tenney Canning Co.*, 16 Sup., 60, notably the non-residence of the defendant; *Gibney* v. *Pennsylvania Motor Car Co.*, 29 C. C., 651. The advice in Brewster's Practice, Vol. I, Sec. 77, "In all cases you should have prepared, if possible, before you issue this writ, an affidavit of cause of action" is wise. Further, it should be most carefully drawn [27] to stand criticism as minute as in the case of an affidavit to hold to bail in a *capias ad respondendum.*

Quashing the Attachment.

There is in our practice a confusion between quashing a foreign attachment and dissolving it by making the above rule absolute. Every student of the subject is indebted to President Judge Rice, of the Superior Court, for his explanation of the use of the motion (or rule) to quash the writ. His own words are so explicit and instructive that they must be given. He said in *Nicoll* v. *McCaffrey, supra,* on p. 193 of 1st Superior Reports:

[26] Contra: *Sims* v. *Stribler*, 16 Phila. 9 s. c. 14 W. N. 100; *Brock* v. *Brock*, 17 Phila. 156; *McCulley* v. *Chisholm*, 19 Phila. 337. The last of these was in 1888. The present writer has found little that is forcible in these, either in reason or in authority.

[27] This should be emphasized.

"II. Speaking of the power of the court to quash a writ or proceeding, Judge Thompson said: 'Thus it appears that this remedy is defined as only applicable to irregular, defective, or improper proceedings. It would be extremely hazardous to extend it to any other cases, unless where there is a consent of parties.' *Crawford* v. *Stewart,* 38 Pa. 34. It is sometimes contended that this remedy is only to be applied where it appears on the face of the writ or record of the proceeding that it is irregular, defective, or improper, and it is true that there is a distinction between quashing and dissolving, an attachment; a distinction too frequently disregarded in practice. But it is now too well settled by precedent to permit discussion, that the court has power to quash a writ of foreign attachment upon proof of facts which are not disclosed by the record, as, for example, that the defendant is a resident of the state[28] or that the property is not liable to foreign attachment: *Brown* v. *Ridgway,* 10 Pa. 42; *Holland* v. *White,* 120 Pa. 228; *McElroy* v. *Dwight,* 120 Pa. 232, note. It seems to be equally well settled that where a court of record may quash or dissolve on extrinsic evidence which cannot be put on the record, the presumption is that everything was done rightly and according to law. All that was brought up by writ of error or *certiorari* in such a case was the record, and as the evidence and the opinion of the court are no part of the record they could not be reviewed, although actually sent up with it."

This last statement is in accord with the decisions of the Supreme Court, of which a recent one is *Bellah* v. *Poole,* 202 Pa., 72, which was an appeal by the defendant from the refusal of the court below to quash a writ of foreign attachment. The plaintiff requested the court below to discharge the rule for two reasons: (1) That the defendant was a resident of the state of Delaware, and (2) that if he were a resident of Pennsylvania, he waived his right to raise that question by giving bond to dissolve the attachment. Testimony was taken before the trial judge and he discharged the rule, and this order was assigned for error. In his opinion, Mr. Justice Mestrezat said:

"The appellee has moved this court to quash the appeal on the ground that the order of the trial court refusing to quash the writ of foreign attachment is not reviewable. This motion must prevail under the settled practice of this court. In *Lindsley* v. *Malone,* 23 Pa., 24, which was a foreign attachment, the defendant entered a conditional appearance and obtained a rule on the plaintiff to show cause why the writ should not be quashed on the ground that he was a resident of the state when the writ was issued. Evidence was heard in support of the rule which, however, was discharged by the court. On a writ of error to this court, it was held that the action of the court below was not the subject of review by the supreme court. Knox, *J.,* deliver-

[28] Is the burden on the plaintiff to prove non-residence? See *Sibley* v. *Dougherty,* 9 Kulp, 185.

ing the opinion, observed that 'as there is no bill of exceptions to evidence on a motion for summary relief, the refusal of the district court to quash the writ cannot be reviewed here,' citing *Miller* v. *Spreeher,* 2 Yeates, 162; *Shortz* v. *Quigley,* 1 Binn., 222, and *Brown* v. *Ridgeway,* 10 Barr, 42. To the same effect are *Philadelphia & Reading Railroad Co.* v. *Snowden,* 161 Pa., 201, and *First National Bank* v. *Crosby,* 179 Pa., 63, in the former of which it is said in the opinion that 'refusal of the court below to set aside the return to the writ of foreign attachment and to quash the writ is not a final judgment, and is, therefore, not subject to an appeal.'"

Reverting to the opinion[29] of Judge Rice in *Nicoll* v. *McCaffrey,* this further rule is deduced and shown (see 1 Sup., pp. 196 and 197):

"Generally speaking a writ of error lies in all cases in which a court of record has given a final judgment or made an award in the nature of a final judgment." (Then the learned judge gives illustrations.) He then shows that the appellate court will not review the decision of the court below upon questions of fact; "because the writ brings up nothing but what appears upon the record, and the evidence is not part of the record."

These conclusions may be stated: (1) An appeal will not lie from a refusal of the court below to quash a foreign attachment; (2) it will lie from an order which quashes the foreign attachment, but (3) in no case will anything *dehors the record* be considered by the appellate court.

The Progress of the Suit.

If the attachment be not dissolved or quashed, one of several courses may follow.

1. The defendant may not appear.

2. The defendant may appear and give bail and dissolve the attachment.

3. The defendant may appear, but not give bail and the attachment is not dissolved.

1. The Act of May 10, 1889, P. L., 183, amended Section 53 of the Act of June 13, 1836, and is:

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[29] The opinion distinguishes between facts shown by evidence, as to which it "would not be the province of the reviewing court to pass upon the credibility of the witnesses or to decide as to the weight of the testimony" and facts agreed upon and made part of the record.

"It shall be lawful for the plaintiff at and after the third term of the court after the execution of the writ, to take judgment against the defendant for default of appearance unless the attachment before that time de dissolved: Provided, That the plaintiff fifteen days prior to the entry of said judgment shall have filed his declaration."

The time for filing the declaration was thereby made reasonable and easily practicable.[30]

When may the judgment for want of an appearance be entered? "At the third term after the execution of the writ;" *i. e.,* after service of the writ. The case of *Wallace* v. *Scholl,* 9 Sup., 284, illustrates this. It was an appeal from the Common Pleas of Northampton County, in which there were six terms each year, thus:

January,	commencing	2nd	Monday	of January.
March,	"	"	"	" March.
May,	"	"	"	" May.
July,	"	"	"	" July.
September,	"	"	"	" September.
November,	"	"	"	" November.

A writ of foreign attachment was issued, returnable the second Monday of May, which was served on one garnishee on April 23d and on another on May 1st. Judgment was entered against the defendant for want of an appearance, on September 20th. The writ was "executed;" that is, served on the garnishees, in March Term. The first term "after" began on the second Monday of May; the second term "after" began on the second Monday of July; the "third term of the court after the execution of the writ" was the one that began on the second Monday of September. In that term judgment was entered, which was held to be correct by the lower and by the appellate courts. Smith, *J.*:

"The return of a writ is no part of its execution, no matter when made. 'To execute a writ is to do the act commanded in the writ;' Bouvier. The officer is given until the return day to execute process,

[30] In *Melloy* v. *Deal,* 124 Pa., 161, it was held upon the authority of *Foreman* v. *Schricon,* 8 W. & S. 43 and succeeding cases, that the declaration must be filed before the return day of the writ. It is refreshing to read the dissenting opinion of Mr. Justice Mitchell (pp. 168, *et seq.*). No one who had to do the thing practically, under the exigencies of active business, could or would have invented the time requirement of *Foreman* v. *Schricon.*

and is then required to inform the court how he performed his duty. But the return is no part of the execution of the writ. It is simply an account or report of the manner of its execution rendered to the court whence it issued and is usually endorsed thereon. * * * According to the sheriff's return the acts required by the statute to constitute an execution of the attachment had been performed and completed on May 1. It is clear, therefore, that the writ in the present case was duly executed before the commencement of the May term, and the judgment was properly entered at the September term, which was the third term after such execution."

In Philadelphia there are four terms in each year, beginning respectively, on the first Mondays of March, December and June, and the third Monday of September. In *Shuster* v. *Bonner,* 7. W. N., 17, the writ was issued on September 14th, returnable the third Monday of September, but was *served on return day.* Judgment by defendant was taken on the nineteenth of the following March. A rule to strike off the judgment was made absolute. Thayer, *P. J.,* said:

"The plaintiff was not entitled to judgment until 'the third term after the execution of the writ.' The first term *after* the execution of the writ was December term. The judgment was, therefore, premature."

It need not be argued that where there is no appearance judgment cannot be taken against the absent defendant for want of an affidavit of defence; not even in the case of real estate attached and service on the premises on the party in possession. *Watts* v. *Fox,* 64 Pa., 336.

The third term as determined by those cases having arrived, and the declaration ("statement," in present parlance) having been filed, the plaintiff may file this short order, viz.:

v. } C. P.
Term,
No.
For. Att. Assumpsit.

Prothy., C. P.,

Enter judgment in favor of the plaintiff against the defendant in above for want of an appearance.

A. H.
Atty. for Plaintiff.
1908.[81]

[81] No attorney should neglect to fold and properly endorse every paper which he files in the office of a prothonotary.

It is the practice not to do this until the fourth day of the third term, that is, on the *quarto die post,* by analogy to the *dies gratiae* under the 33d Section of the Act of June 13, 1836, P. L., 568.

Assessment of Damages.

The Act of April 9, 1870, P. L., 60, authorizes the plaintiff, after judgment by default,[32] to enter a rule on the prothonotary to assess the damages, which the prothonotary may do, upon evidence produced to him, or upon the affidavit of the plaintiff, or some other person cognizant of the transaction.

This rule may be entered, of course, without applying to a judge, thus:

v. } C. P.
Term,
No.
For. Att. Assumpsit.

AND NOW, to wit, 1908, on motion of A. H., attorney for the plaintiff, the court grants a rule on the prothonotary to assess damages in above.

Damages assessed by the prothonotary on judgment in foreign attachment against defendant for want of appearance without this rule to assess damages have been held to be in violation of the Act of April 9, 1870. *Keystone Brewing Co.* v. *Foristal,* 13 Luzerne Legal Register, 244; *Oliver* v. *Becker,* 15 Dist., 599. To these citations others may be added on this point, and to the further requirement that an affidavit of claim (or, it may be inferred, "evidence produced before him") is necessary to justify the assessment of damages by the prothonotary. *Seymour* v. *Fulton,* 9 Dist., 611, in which there is an interesting discussion by Stewart, *J.; Odenkirk* v. *Odenkirk,* 11 Dist., 42.

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[32] This judgment is merely *in rem. Steel* v. *Smith,* 7 W. & S., 447; *Glenn* v. *Davis,* 2 Grant, 153; *Smith v. Eyre,* 149 Pa., 272.

AFFIDAVIT OF PLAINTIFF'S CLAIM FILED FOR ASSESSMENT OF DAMAGES.

v. } C. P. Term, No.

For Att. Assumpit.

County of , *ss.:*

, the above named plaintiff, being duly according to law, says that the above named defendant is justly and truly indebted to him, the said plaintiff, in the sum of dollars with interest thereon from the day of , 1908, for goods and merchandise, to wit, sold and delivered at by the plaintiff to the defendant at the defendant's special instance and request at the times and in the quantities and for the amounts specified in the[33] annexed (or the following) account which is a true and correct copy of plaintiff's book of original entries. That no part of the amount has been paid and the whole thereof is justly due and unpaid.

(Sign)

Sworn (or affirmed) to and subscribed before me this day of A. D. 1908.

If the suit be for breach of contract, or on other grounds, the affidavit should explicitly aver all the essentials to show a complete cause of action. If the claim be on a promissory note, bill of exchange, or instrument of writing, copies of the same should be set out in the affidavit; or the original, as "evidence produced before him" may be exhibited to the prothonotary; but even then, it will be well to have an affidavit of claim.

If the affidavit of "some person cognizant of the transaction," other than the plaintiff, be filed with the prothonotary, it should state why such person makes it, and also set out his knowledge.

Ordinarily, as the proceeding is *ex parte,* careless practice is not questioned; but the garnishee may attack the judgment that has been irregularly entered.

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[33] Add—"Said copy is marked A and is made a part of this affidavit."

ASSESSMENT OF DAMAGES.

v. } C. P.
Term,
No.
For. Att. Assumpsit.

AND NOW, to wit, 1908, in accordance with the rule entered on the prothonotary to assess the damages in the above case and upon the affidavit of the plaintiff (or of a person cognizant of the transaction), I assess the plaintiff's damages as follows, to wit:

Amount of claim for goods sold and delivered as set forth in said affidavit, ... $
Interest thereon from . . . . . .

Prothonotary.

Or,

[34] ASSESSMENT OF DAMAGES.

Caption }

AND NOW, to wit, 1908, under the rule entered on the prothonotary to assess damages and upon the evidence of X examined under oath before the prothonotary [and upon the production of[35] (promissory note of the defendant date payable after date for the sum of $), which was given in evidence by the plaintiff] the plaintiff's damages are assessed by me as follows:[36]

Amount of claim on (state it) . . . . . $
Interest from

Prothonotary.

These forms are open to correction. They might be multiplied to show varieties of demands. The purpose is simply to impress painstaking compliance with the provisions of the statute.

ABATEMENT OF ATTACHMENT.

If the plaintiff fail to file a statement of his cause of action within one year after the issuance of the writ, such writ shall abate without any further action by the defend-

[34] See—1 Brewster's Pr., sec. 87.

[35] If other paper, *e. g.*, bond, bill of exchange, written contract, &c., describe it. It is better to err, if at all, in particularity. If only oral testimony be given let the attorney for plaintiff see that the substance is embodied in the assessment signed by the prothonotary or his deputy.

[36] In cases of tort damages are assessed by writ of inquiry.

ant or garnishee and its lien shall thereupon cease. Act of May 12, 1897, Sec. 1, P. L., 62.

Therefore, a plaintiff who wishes to go on with his claim must be careful not to let the year glide away with neglect on his part of this step in the case.[37]

This is the formula: File statement within the year and fifteen days before taking judgment by default.

2. ATTACHMENT DISSOLVED BY DEFENDANT ON GIVING SECURITY.

If the defendant at any time before the payment of the money put in and perfect bail (to the plaintiff's action in the sum demanded, or in such sum as the court, upon the cause of action shown, shall order), or make a deposit in the manner provided upon a *capias ad respondendum* (*i. e.*, pay the amount into court), the attachment, and all proceedings had thereon shall be dissolved. Act of June 13, 1836, Sec. 62, P. L., 583.

The bail shall be bail absolute, in a recognizance in double the amount in controversy, as nearly as may be ascertained, with one or more sufficient sureties conditioned for the payment of the debt or damages, interest and costs that may be recovered. Act of March 20, 1845, Sec. 2, P. L., 189.

Considerable time has been spent in a futile search for some authoritative decision in regard to the form and the obligee in this recognizance. The words of the statute just given do not prescribe these.

The forms in Smith's forms, p. 423 (referred to in note to Sec. 2274, in 2 Tr. & H. Prac.), and in Dunlap's Forms, p. 187, are alike, and they are substantially the same as that set out in *Wright* v. *Keyes,* 103 Pa., 567. The instrument of writing in that case was as follows:

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[37] *Held,* in *Seymour, et al, Receivers,* v. *Fulton,* 9 Dist., 611, that where the statement had been filed before the return day and after the expiration of two years by leave of court, plaintiff filed an amended statement that if the original statement was defective, the amended one was too late. If the amended statement did not introduce a different cause of action, is not the accuracy of this open to question?

D. M. Wright
v.
S. S. Moses
} In the Court of Common Pleas of McKean County, of February Term, 1877, No. 179.

Foreign attachment in debt, $1000. McKean County, *ss.*:

We, S. S. Moses, the above defendant, and D. J. Keyes, of the County of McKean, severally acknowledge ourselves to be indebted to the said D. M. Wright in the sum of one thousand dollars, to be levied of our goods and chattels, lands and tenements, respectively, and to be void on the condition that the said S. S. Moses shall pay to the said D. M. Wright the debt or damages, interest and costs that may be recovered against him in said foreign attachment.

Taken and acknowledged March A. D. 1877.

S. S. Moses, (L. S.)
D. J. Keyes, (L. S.)

This was acknowledged by D. J. Keyes before a justice of the peace, as follows:

State of Pennsylvania, County of McKean, *ss.*:

Personally appeared before me, C. C. Moses, a legally commissioned justice of the peace, in and for the said county, D. J. Keyes, of said county, who acknowledged the above to be his signature, who also swears that he is worth the full and true sum of one thousand dollars over and above his just debts and amount exempted by laws of Pennsylvania from levy and sale on execution.

Sworn and subscribed before me this 14th day of March, A. D. 1907.

D. J. Keyes,

C. C. Moses, Justice of the Peace, (L. S.)

The bond and acknowledgment were filed of record in the Court of Common Pleas of McKean County, and the sheriff permitted the defendant to remove the attached lumber.

In a suit in debt on the above bond, Keyes contended that there could be no recovery, it being in form a recognizance, and not having been approved or taken by the proper court, but by a justice of the peace, it failed to meet the statutory requirements of such a recognizance, and was therefore void. This contention was sustained by the trial judge, and he instructed the jury to find for the defendant. Verdict accordingly and judgment thereon. Writ of error by plaintiff who assigned for error the instruction of the court. Reversed by Supreme Court. It was held that the instrument on its face was a complete bond. "He (defendant) gave his bond, and if the property was released without objection by the plaintiff, there is no equity in his favor."

It was conceded that the obligation was void as a recognizance. This would follow from the fact that it was not entered into before a court, or officer duly authorized. A justice of the peace had no such authority. It would seem that the form of the instrument was not condemned, but the failure of approval by the court or a competent official. Court of Common Pleas No. 1, of Philadelphia, in *Reis* v. *Junker,* 9 Dist., 296, made absolute a rule to show cause why the garnishee in a foreign attachment should not give a bond to the sheriff, conditioned for the return of the goods, the sheriff thereupon to withdraw, etc. The garnishee claimed the goods which had been attached as his own property and took the rule.[38] The case has been cited as if it showed that the recognizance should be given to the sheriff in case of an appearance and dissolution of a foreign attachment upon bail by the defendant.

It is not easy to see why it should not be taken in the name of the plaintiff, who alone is interested in the "debt or damages, interests and costs," when the attachment is compulsorily dissolved by the action of the defendant under his statutory right; the recognizance, of course, to be approved by the court, or commissioner of bail duly appointed. The action of the court in dissolving the foreign attachment protects the sheriff in withdrawing his levy on the goods. The above sections of the Act of June 13, 1836, and of the Act of March 20, 1845, do not mention indemnity to the sheriff.

The 2d Section of Rule 20 of the courts of common pleas, of Philadelphia county, is:

> "In cases of foreign attachment, bail shall not be taken in order to dissolve the attachment, without first giving notice to the plaintiff or his attorney, of the time and place of taking such bail, that he may have an opportunity of excepting to the sufficiency thereof."

After the defendant has entered a general appearance he cannot raise "any question affecting the irregularity

[38] The 50th section of the Act of June 13, 1836, provides, unless the person in possession will give security therefor, *i. e.,* take the bond of the garnishee. See Jaffray's Appeal, 101 Pa., p. 391. A different "situation" from bail to dissolve by defendant.

of the process. He admits it by appearing." Craig, *P.J. Borough of Lansford* v. *Jones,* 5 Dist., 483.

It was said by Judge Woodward in *Megee* v. *Beirne,* 39 Pa., 51 (on p. 62): "Foreign attachment is not purely a proceeding *in rem,* but under our statute it is the equivalent of a summons for commencement of a personal action," and it was said by Judge Mitchell in *Longwell* v. *Hartwell,* 164 Pa., 533 (on p. 538): "Foreign attachment is a proceeding *in rem.* by attachment of a non-resident's goods, with the primary object of compelling the defendant's appearance." By the giving of bail the attachment is dissolved; the court has jurisdiction over the defendant *in personam;* the suit proceeds as if it had been begun by a summons which had been duly served.

Judgment may be entered against the defendant who has appeared in a suit of foreign attachment in assumpsit under the Act of May 25, 1887, P. L., 271 (sometimes called the "Statement Act;" sometimes the "New Procedure Act"), for want of an affidavit of defence. *Wing* v. *Bradner,* 162 Pa., 72. This was the case of an appearance under the 64th Section of the Act of June 13, 1836, in which the defendant did not give bail or security, but the basis of the requirement to file an affidavit of defence was that he had caused a general appearance to be entered for him.[39] See also *Railroad* v. *Snowdon,* 166 Pa., 236. (The report of this case shows only that defendant had entered a general appearance. It does not state that bail had been entered to dissolve the attachment.) See *Allen* v. *Allen,* 23 W. N., 371; *Smith* v. *Eyre,* 26 *Ibid,* 314.

If no affidavit be required, or if a sufficient affidavit of defence be filed by the defendant, the case goes on to issue and trial.

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[39] There would be force in the contention against the right to judgment for want of an affidavit of defence that the words of section 63 of the Act of June 13, 1836, "and the action shall proceed in like manner as if the same had been commenced by writ of *capias ad respondendum,*" if this section had been enacted after the Act of 1842, which abolished imprisonment for debt. In 1836 a capias was issued in actions of assumpsit. It was not restricted as specified in the first section of the Act of July 12, 1842, P. L., 339.

3. *Appearance, but Attachment not Dissolved.*

The defendant, instead of giving bail or security at his election, may, under the 64th Section of the Act of June 13, 1836, cause an appearance to be entered for him and take defence; in which case the action shall proceed as if by summons, and the attachment shall continue to bind the property, "the estate or effects attached," as in other cases. 2 Tr. & H. Prac., Sec. 2281.

It appears that the distinction between the operation of this section and the 63d Section is in these respects: (1) The giving or not giving of bail, and (2) the retention or loss of the lien of the attachment.

The proceedings after the appearance of the defendant, it is submitted, are alike in all the subsequent steps in the progress of the suit to judgment.

If judgment in either case be entered by default for want of affidavit or defence, or of pleas, then proceed as pointed out under 1 *supra,* where defendant does not appear —except that damages in action of tort are assessed by writ of inquiry.

PROCEEDINGS AGAINST GARNISHEE AFTER JUDGMENT AGAINST DEFENDANT.

It has been remarked that a foreign attachment means two suits. One is plaintiff *v.* defendant; the other plaintiff *v.* garnishee. The second now is to be considered. By the 54th section of the Act of June 13th, 1836, the plaintiff, after judgment against the defendant, may have a writ of *scire facias* against the garnishee, commanding him to appear at the next term and show cause, if any he have, why the plaintiff should not have execution of his judgment "of the estate and effects of the said defendant attached as aforesaid in his hands or possession." By section 55, Interrogatories may be exhibited to the garnishee "touching the estate and effects of the defendant in his possession or charge, or due and owing from him at the time of service of the writ or at any other time."

It has been held that if the garnishee has appeared in the suit begun by foreign attachment, no writ of *scire facias* is required against him.

"When the garnishee appears in response to the clause of summons in a writ of attachment a *sci. fa.* is unnecessary, for the purpose of the *sci. fa.* is to compel an appearance, and when that already exists on the record, there is no necessity for requiring a repitition of it." Arnold, *P. J., Philadelphia Textile Machinery Co.* v. *Aetna Fire Ins. Co.*, garnishee, 9 Dist., 44.

It is hard to answer this opinion and yet the words "next term" in the 54th section may be construed to afford the garnishee an extension of time and mean that he is entitled to the issuance of a *scire facias* even if he has appeared to the attachment.

Further, it is believed that the usual practice is to issue the *scire facias* and have it served on the garnishee. The original foreign attachment simply summoned the garnishee. The *scire facias*

"makes known to the said garnishee that he be and appear before * * * to show if anything he knows or has to say why the said plaintiff should not have execution of the judgment aforesaid, of the proper goods and chattels, rights and credits of the said defendant in the hands or possession of the said garnishee."

This is after judgment against the defendant, and is a writ calling on the garnishee who has been summoned to appear to do more; *i. e.*, show cause as is set forth in the *scire facias*.

This writ is obtained by a præcipe thus:

A. B.
v.
C. D. defendant.
E. N. garnishee.

C. P.
Term
No.

For Att. assumpsit—(or trespass)

Prothy., C. P.

Issue *Scire Facias* against the garnishee in above returnable [40]

A. H.
Atty. for Plff.

[40] State return day; not, *sec. leg.*

If the garnishee fail to appear, or if he appear and fail to answer the interrogatories of which a copy has been served upon him,[41] judgment may be entered against him by default; mark, by default.

Acknowledgment is due to Judge Mitchell for the patient study and clear conclusions shown in his opinion in *Longwell* v. *Hartwell,* 164 Pa., 533. That was an attachment execution, but the practice in that proceeding follows that in foreign attachment. The best solution of what had been obscure is found in his summary (on p. 542), which is now quoted:

"The result of all our cases may be summed up in the following propositions:

1. The garnishee failing to appear after service of the attachment, with clause of summons, but no specific attachment of goods or credits, plaintiff will be entitled to a judgment by default. But such judgment will be interlocutory only, and plaintiff cannot liquidate it, or have execution, without first by writ of inquiry or before the prothonotary as the rules of court or the practice in cases of default may prescribe, establishing his claim by evidence of the garnishee's possession of goods or credits of the defendant; and the measure of his damages will be the value of such goods. This is the present case.

2. If the attachment is levied upon specific goods, the default may be taken as an admission of the possession of such goods, but the plaintiff must, by writ of appraisement or otherwise, establish their value.

3. If the attachment is of money, or a debt, and the amount appears in the sheriff's return the default is an admission of all the requisite facts, and no further evidence or inquiry is necessary. This is *Layman* v. *Beam.*

4. The proper form of the judgment is for plaintiff against the garnishee, and that the garnishee has in his hands certain goods, effects or credits, to wit (naming them), of the value, etc., or that the garnishee is indebted to the defendant in the sum of, etc.

5. Plaintiff's measure of damages, which determines the amount of the judgment against the garnishee, is the value of the goods attached, of course not exceeding the amount of his judgment, interest and costs against the defendant. The single exception is when the garnishee neglects or refuses to answer interrogatories, in which case, by the express terms of sec. 57 of the Act of 1836, the judgment against him is that he has goods or effects of the defendant sufficient to satisfy the plaintiff's demand, and execution may issue against him as for his own proper debt."

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[41] By section 3, rule 20 C. P. Philadelphia County, the rule may be entered upon the garnishee to answer the interrogatories in fifteen days. Printed forms of interrogatories, with the order for the entry of this rule and notice to garnishee endorsed, may be bought of the law stationers.

By section 4 of Rule 20, if the plaintiff does not within three months

ANSWERS OF GARNISHEE AND THE PRACTICE RELATING THERETO.

By section 56 of the Act of 1836, upon a rule granted upon the motion of the plaintiff, it shall be the duty of the garnishee to make "full, direct and true answers" to the interrogatories.

The answers may admit an indebtedness of the garnishee to the defendant. If this be so the plaintiff may enter a rule of course, thus:

Caption }

Proth'y. C. P.

Enter a rule on garnishee in above to show cause why judgment should not be entered against him for the amount admitted in his answers to be due by him to the defendant—returnable on (fill in the next rule day of the court).

Signed, A. H.
Attorney for plaintiff.

If the admission be not of an indebtedness in money but of personal property in the hands of the garnishee, the rule should be to show cause why the plaintiff should not have execution to be levied on the estate and effects of the defendant admitted by the answres of the garnishee to be in his hands and possession or of so much of them as shall be sufficient to satisfy the plaintiff's judgment against the defendant, besides costs of suit.

It has been repeatedly held that

"the answers of a garnishee are not to be construed with the same strictness as an affidavit of defense, and judgment will not be entered on answers unless the answers do by fair interpretation admit an indebtedness due to the defendant * * * .A garnishee is entitled to the protection of the court, and a judgment should not be entered

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after judgment issue a *scire facias* against the garnishee, or when the garnishee has entered an appearance, of the plaintiff did not file interrogatories and serve a copy thereof on the garnishee within three months, the court upon motion of the garnishee, if no sufficient cause is shown for the delay, may order the attachment to be dissolved. By section 5, the garnishee may enter a rule on the plaintiff to file interrogatories within fifteen days after service of notice of the rule—judgment of *non pros.* to be entered in case of default.

against him when there is doubt as to the defendant's title to the fund attached." *Conshohocken Tube Co.* v. *Iron Car Co.*, 167 Pa., 592. No list of citations beyond this is needed, but see *McCallum* v. *Morris*, 179 Pa., 427.[42]

Yet the answers may be insufficient, evasive, lacking information which should be stated. The practice seems to permit the plaintiff in such a case to follow any of several courses. He may take a rule for judgment against the garnishee for want of sufficient answers. He may demur to the answers, but the rule to show cause is the proper practice—*Schlayer* v. *Bowers*, 30 Pa., C. C., 535. Or he may file exceptions to each answer to which he objects and on the hearing of his exceptions the court may order the garnishee to answer further.

See opinion of Head, *J. McGeary* v. *Huff*, 31 Sup., 401 (on p. 404). See also under title "Executions," 1 Tr. & H. Pr. sec. 1201, and note 1 on p. 698. The plaintiff may except or demur, *Hagy* v. *Hardin*, 186 Pa., 428.

If the plaintiff be dissatisfied with the denials in the answers of the garnishee, or if he does not choose to file interrogatories, he may rule the garnishee to plead to the *scire facias*, thus:

} C. P.
Term
No.

Sci. fa. sur foreign attachment.

Proth'y C. P.

Enter a rule on garnishee to plead in fifteen days[43] or judgment sec, reg.

A. H.
Attorney for plaintiff.

The usual plea is *nulla bona*, thus:

} C. P.
Term
No.

The garnishee pleads
nulla bona.

J. F.
Atty. for garnishee.

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[42] Approved, 186 Pa., p. 430.

[43] Fifteen days under Phila. C. P. Rule.

This plea is that the garnishee had no goods or moneys of the defendant in his hands, at the time of the service of the suit or attachment, or at any time thereafter.[44] If there be any defence, *e. g.*, a lien in his own favor on the goods, a prior attachment, set-off, it will be safe for him to plead specially or give notice of special matter. In *Allen* v. *Erie City Bank,* 57 Pa., 129, in which there was a question of the right to offer evidence under the general plea, it was said by Thompson, *C. J.*, at page 139,

"We see not, under the pleadings, how the evidence could have been received. Conceding that it might possibly have been evidence under the plea of *nulla bona,* with notice of special matter, notice was not given. The plea without this, we think, only puts in issue the question of goods and effects in the hands of the garnishee. This is not only reasonable in itself, but seems to be supported by *Flanagin* v. *Wetherill,* 5 Whart., 286, *McCormack* v. *Hancock,* 2 Barr, 310, and Sergeant on Attachment, 90. That notice of special matter should have been given in the case where the plea was *nulla bona,* and the offer was to show lien for freight due the garnishees, was held in *Wood* v. *Roach,* 1 Yeates, 177."

The right of the garnishee to defend, is thus stated by Mr. Justice Fell *in Willis* v. *Curtze,* 203 Pa., 111:

"'Generally the garnishee in a foreign attachment may make any defence against the plaintiff in the writ that he could make against his original creditor. The judgment in the attachment establishes only the existence of the debt due the plaintiff by his immediate debtor. The plaintiff stands in no better position as to the thing attached than does his debtor, and any defense good against the latter will prevent a recovery against the garnishee—" citing cases.

An interesting note upon the question whether a garnishee may or should interfere in behalf of the defendant is found at the foot of the report of *Lane* v. *White,* 24 W. N., 380:

"While the garnishee in a foreign attachment is not a party to the judgment against defendant in the writ, it is not quite accurate to say he is a stranger thereto in the sense intended by plaintiff. The judgment is necessarily the foundation of subsequent proceedings against th garnishee, by which it is sought to take the property or effects of the defendant, attached in his hands, and apply the same to plaintiff's claim. As a general rule the garnishee is bound to see that the proceedings to that end are not illegal. In a legal point of view, his rela-

[44] 2 Tr. & H., sec. 2288.

tion to the defendant in a writ of foreign attachment is not always the same. In some cases he is simply bailee of defendant's property. In others, he is his debtor, or he may be either bailee or debtor with a counter claim of his own, consisting of a special lien or a set-off; or, he may be a trustee of money or property under a valid trust created by the defendant in favor of another party. In either case, when he occupies the position of bailee or trustee, it is his right, as well as his duty, for his own protection, if nothing more, to insist that no property or effects be taken out of his hands, except upon valid process. That duty, if it has not existed before, certainly arises when the garnishee is called upon by *scire facias* to show cause why plaintiff should not have satisfaction of his judgment out of the estate or effects of the defendant in his hands or possession. The *scire facias* is predicated of a valid judgment against the non-resident defendant, and if the garnishee is aware that no such judgment exists, or if he has any other just ground of defense, he has a right to interpose it. If he neglects to do so, and the attached property is taken from him, he may become personally liable to those whose interests he could and should have protected: 2 Tr. & Haly Prac., sec. 2289; Serg. on Att., 113, etc.

It has been held that under the general plea of *nulla bona* the garnishee may, on trial of the issue, take advantage of the invalidity of the judgment on which the *scire facias* issued: *Pancake* v. *Harris,* 10 S. & R., 109; *Thornton* v. *Bonham,* 2 Pa., 102. If he can do that, there is no good reason why he may not apply to the court in behalf of the non-stricken off, as was done in this case." Mr. Justice Sterrett in *Melloy* v. *Deal & Burtis,* 124 Pa., 161.

It was said by Mr. Justice Agnew, in line with this, but not on the same point: "The garnishee must give notice to his own creditor if he would protect himself; *Morgan* v. *Neville,* 74 Pa., 52.

INTERPLEADER.

The garnishee may disclaim all interest in the subject matter of the action (that is the claim of the defendant against him which the plaintiff "in the shoes of the defendant" seeks to recover from the garnishee or in goods and chattels which have been attached). If the garnishee so disclaim he is entitled to an interpleader upon his suggestion between "some person not a party to the action," and the plaintiff in the foreign attachment under the provisions of the Act of March 11, 1836, P. L., 77, *Barnes* v. *Bamberger,* 196 Pa., 123.[45]

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[45] This obviates any consideration of the Act of June 10, 1881, P. L., 106, for an interpleader in foreign attachment. This Act of 1881 was said to be unconstitutional in *Reynolds Lumber Co.* v. *Reynolds,* 4 Dist., 573, but?

INTEREST.

This last cited case also reiterates the rule that "a foreign attachment suspends the interest on so much of the debt as will be required to satisfy the plaintiff's demand."

The exception is in a case where there has been collusion, unreasonable delay, or litigation on the part of the garnishee; *Jones* v. *Mfrs. Natl. Bank,* 99 Pa., 317, and cases cited by Trunkey, *J.*

COSTS—COUNSEL FEE.

A garnishee without fault may recover costs; *Barnes* v. *Bamberger, supra.* By the Act of April 22, 1863, sec. 1, P. L., 527, a garnishee is entitled to a reasonable counsel fee out of the property in his hands; either if after issue joined he be found to have in his possession or control no property of the defendant nor to owe him any debt other than admitted in the plea or answers, or if the plaintiff without going to trial take judgment against the garnishee for what is admitted in his plea or answers.[46]

The Act of June 11, 1885, P. L., 107, provides that where

"the garnishee may be found to have in his possession or under his control no real or personal property of the defendant nor to owe him any debt the said garnishee shall be entitled to recover from the plaintiff in addition to the costs already allowed by law a reasonable counsel fee not exceeding ten dollars, to be determined by the court, and taxed as part of the costs." Amended by Act of April 20, 1891, P. L., 35, viz.: where there are several garnishees each may be allowed a counsel fee.[47]

JUDGMENT AND EXECUTION.

As stated in the fifth proposition of the opinion in *Longwell* v. *Hartwell,* on page 543 of 164 Pa.,

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[46] The practice does not seem to be uniform upon the taxing of a garnishee's counsel fees when the garnishee has a surplus remaining in his hands above the amount of the plaintiff's judgment. See note to *Getz* v. *Smith,* 29 W. N., 459.

[47] See *Lummis* v. *Big Sandy Land & Mfg. Co.,* 188 Pa. 27. (Counsel fee $250 awarded. The contention must have been as to the right to the fee, not its amount.)

"where the garnishee neglects or refuses to answer interrogatories * * * * by the express terms of section 57 of the Act of 1836, the judgment against him is that he has goods or effects of the defendant sufficient to satisfy the plaintiff's demands, and execution may issue against him as for his own proper debt."

By section 59—If issue be had and a trial had upon the *scire facias*, the jury must find what goods and effects, if any, were in the hands of the garnishee, and the value thereof. The judgment is an award of execution, to be levied of the goods and effects so found by the jury, or so much of them as shall be sufficient to satisfy the plaintiff's demand, together with legal costs; 2 Tr. & H. Prac. sec. 2291.

By section 60—If the garnishee, after judgment against him on the *scire facias*, neglect and refuse to produce and deliver the goods and effects of the defendant or to pay the debt or duty attached, the plaintiff shall have execution against the garnishee as in the case of his proper[48] debt.

Security to Restore.

The 61st section of the Act of June 13, 1836, requires the plaintiff before execution to

"give security by recognizance and sufficient securities to be approved by the court, or by one of the judges thereof in vacation, with condition, that if the defendant in the attachment shall within a year and a day come into court and disprove or avoid the debt recovered against him, or shall discharge the same with costs, in such case the the plaintiff shall restore to the defendant the goods or effects, or the value thereof, attached and condemned, etc."[49]

The recognizance need not be given, according to *Fitch* v. *Ross*, 4 S. & R., 557, before issuing execution. It is in time if given before the sale. By Act of May 8, 1855, sec. 2, P. L., 532, if the plaintiff wait a day and year, leaving the property unsold he may then proceed to sale without giving security.

These provisions of the statute regulating foreign attachment show much consideration for the absent defendant, as does this further proceeding, viz., the

SCIRE FACIAS AD DISPROBANDUM DEBITUM.

By this writ the right is exercised of disproving the debt within a year and a day, which is secured to the defendant

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[48] See as to executors and administrators, garnishee, *Lorenz* v. *King*, *supra*, and as to execution against garnishee *de bonis propriis*, *Fredrick* v. *Easton*, 40 Pa., 419. Also see *Fitch* v. *Ross*, 4 S. & R., 557. For form of judgment against executor, see *Maurer* v. *Kerper*, 102 Pa., 444.

[49] See Smith's Forms, p. 420 for form of recognizance, and garnishee an executor, p. 422 (Act of July 27, 1842 P. L. 423).

by the statute. The manner of proceeding to disprove the debt under the custom of London is set forth in Sergeant on Foreign Attachment, pp. 48-50. The following statement by Shippen, President in *McClenachan et al.*, v. *McCarty*, 1 Dallas, 375, has never been questioned. He wrote:

"The attachment law, and all proceedings under it, suppose the defendant to be an absent person, and *he has, in truth, no day in court*, till he enters special bail; and thereby dissolves the attachment; or comes in afterwards, when the money is recovered from the garnishee, to disprove the debt, which is done by a *scire facias ad disprobandum debitum;* in either of which cases he puts the plaintiff upon the legal proof of his demand, and is admitted to make a full defense."

The proceeding is not clarified by decisions, and the writ is very seldom issued.[50] From the opinion of Stroud, *J.*, in *Bujac* v. *Phillips*, 2 Miles, 71, a case in which the plaintiff in the *scire facias* was the executor of the defendant in the foreign attachment, the following extract is in point:

"It was objected, in the *second* place, that no security similar to that which is required by the *custom of London*, as a pre-requisite to the right of issuing a *scire facias ad disprobandum*, has been entered by the administrator of the original defendant. The nature of this security, under the custom, is not very distinctly defined, but it would seem to be that of special bail. Whether the language of the Act of 1705 calls for the exaction of such security, even where the defendant is alive and sues out the *scire facias* himself, is a point not altogether plain. In *Fitch* v. *Ross*, 4 S. & R. 564, Judge Duncan says he may come in within a year and a day, etc., and contest the demand of the plaintiff *"without* entering special bail." As the plaintiff retains the fruits of the execution in the attachment until the defendant succeeds on the *scire facias ad disprobandum*, there is but little reason for requiring security of any description from the defendant, who seeks in this manner to contest the validity of the plaintiff's original proceeding. But, however this may be, where the defendant in the attachment is alive, and has recourse to this writ, we think the exemption from giving bail, etc., which generally obtains in regard to persons suing in a *representative capacity*, should, in this case, be extended to a party so circumstanced. A different conclusion would, in most instances, be a denial of the right so to interpose altogether.

The time for issuing such writ runs from the taking out execution against the garnishee. *Id.*

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[50] On the best authority it may be said that only one instance is known of the issue of this writ in Philadelphia in fifteen years.

II. Attachments of Real Estate.

By section 49 of the Act of June 13, 1836, the attachment shall be executed as follows:

I. If the attachment be levied on houses, other buildings, or lands, it shall be the duty of the sheriff to leave a copy of the writ with the tenant or other person in actual possession, holding under the defendant in the attachment, and to summon him as garnishee.

II. If there be no person in actual possession as aforesaid, the sheriff shall publish a copy of the writ, for six weeks, in one newspaper printed in the county, if there be one, otherwise in one newspaper published nearest to the land attached, and such writ shall also be published in one or more newspapers in the city of Philadelphia, or elsewhere, as the court, if in session, or a judge thereof in vacation, at the time of issuing the same, having reference to the supposed place of residence of the defendant, shall direct.

III. If the attachment be levied on a rent charge, it shall be the duty of the sheriff to leave a copy of the writ with the owner of the messuage, lot, or land out of which such (rent) shall issue, or upon which the same shall be charged, or if such owner shall not reside within the country, upon the tenant or other person in possession of such messuage, lot, or land, and in either case, to summon such person as garnishee.

IV. In all other cases of incorporeal hereditaments, the attachment shall be executed by leaving a copy of the writ with the person or persons who may be liable to the payment of money to the defendant, or who may be charged with, or otherwise liable to the defendant in respect or such hereditament, and if there be no such person, by publication as directed in the case of houses or lands, of which there shall be no person in possession as aforesaid."

Rents.

Sections 65 to 69 of the Act of 1836 provide for proceedings in cases of attachment executed upon land which shall have been demised for years or otherwise with a reservation of rent. The delivery of a copy of the writ of attachment, shall have the effect of sequestering in the hands of the latter all rents due or to accrue until the execution against the garnishee, unless the attachment be sooner dissolved. The court may at any time after the return of the attachment, on application of the plaintiff, and affidavit of a just cause of action, issue a writ to the sheriff, requiring him to collect and secure from the tenant of the premises, all such rent as shall have accrued at the time of the execution of the writ of attachment, or as may accrue thereafter, until

the further order of the court. No such order can, however be made, unless the sheriff return that the tenant holds under the defendant in the attachment. Under such writ, the officer shall, by virtue thereof, proceed, from time to time, to recover such rents, in like manner and with like powers as are, or shall be possessed by a landlord, under the laws of the commonwealth; and it shall be his duty, forthwith, on the receipt of any moneys arising from the recovery of such rents, to bring the same into court; such rents when paid into court, remain impounded, and a third party cannot be permitted to take the money out of court, without a *scire facias* against the tenant. (This concise summary is copied from 2 Tr. & H. Pr., sec. 2279.) If the rents are not so collected by the sheriff, the plaintiff may after judgment against the defendant, proceed by *scire facias* against the tenant as garnishee, the proceedings being the same as hereinbefore set out in case of attachment of debts owing by garnishee to defendant. The plaintiff upon award of execution may have the money that has been paid into court paid to him upon giving security to restore; or if the rents and profits of the real estate be insufficient to pay his judgment with the interest, costs and charges, he may proceed by *scire facias* for the condemnation and sale of the real estate as in other cases. (See *Id.*, sec. 2280.)

Where lands are attached judgment may be entered against the defendant as in case of personalty, *supra*, for want of an appearance, or if he appear and do not give bail and dissolve the judgment then as in other suits. Execution may issue on the judgment without a *scire facias* (when no tenant as garnishee), *Gibson* v. *Robbins*, 9 Watts, 156.

It would be good practice, it is suggested, in the case of execution against real estate, to present to the court affidavits of real estate brokers or conveyancers, averring their knowledge of the value of the premises and how obtained and their valuation of the real estate, in order to have the amount of the plaintiff's recognizance determined by the court. These affidavits should be filed, with the papers of record in the foreign attachment, in the office of the pro-

thonotary. As with other "*fi. fas.* to condemn" a description of the land should be given to the sheriff with the execution—attached to the writ.

ESTREPMENT.

By the Act of May 8, 1855, sec. 4, P. L. 533, after the execution of any writ of foreign attachment upon the lands and tenements of the defendant or upon lands held by the lien of any judgment or mortgage owned by the defendant, any court, if in session, or any judge in vacation, upon petition and affidavit, in the usual form, of the plaintiff, or some one in his behalf, may award and allow a writ of *estrepment* to say waste upon such lands and tenements, as in other cases.[51]

INTEREST OF MORTGAGEE OR JUDGMENT CREDITOR.

By the third section of this Act of 1855 a foreign attachment against the interest of a non-resident who is a mortgagee or judgment creditor, whose debtor, by judgment or mortgage, is a non-resident and cannot be personally served as garnishee, may be executed by attaching or levying the same upon the lands, tenements or hereditaments upon which said mortgage or judgment is a lien or incumbrance in the same manner as such writs are executed upon the lands and tenements of the defendants therein. Upon final recovery by the plaintiff in such attachment it shall be lawful for the courts to subrogate the plaintiff in the attachment to the right of the mortgagee or judgment creditor—but before such subrogation shall be made the same security must be given as before execution is issued upon judgments in foreign attachments.

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[51] For estrepment generally see 2 Tr. & H. sections 1856-7.

THE LIEN OF FOREIGN ATTACHMENTS.

"The goods and effects of the defendant in the attachment, in the hands of the garnishee shall, after such service, be bound by such writ." Act of July 13, 1836, sec. 50.

In Long's Appeal, 23 Pa., 297, it was held that there was no priority between several writs of foreign attachment served or levied on the same day on real or personal estate. In this regard there is a difference between such writs and writs of *fieri facias* which take priority in the order in which they are delivered to the sheriff. The point is past doubt or question. The opinion of Pennypacker, *J.*, affirmed by the supreme court, *Underhill* v. *Nice,* 175 Pa., 39, in giving preference to an attachment under Act of March 17, 1869, P. L., 8 ("against fraudulent debtors"), over a foreign attachment which went into the sheriff's hands the same day but after the former had been served, reiterates the thought "that in judicial and other public proceedings there are no fractions of a day, and that all transactions of the same day are in general regarded as occurring at the same instant of time." Hence there must be a statutory provision, describing precedence.

So by the fifty-first section of the Act of 1836, "foreign attachments executed upon real estate shall bind the same against purchasers and mortgagees from the time of the execution thereof"—and judgment creditors, Schacklett's Appeal, 14 Pa., 326. As to this last class, Gibson, *C. J.,* said, after quoting the words,

"Purchasers and mortgagees;"—"and judgment creditors are neither The clause, however, is but another proof that every codification of the law must necessarily be lame and imperfect, though executed by the ablest hands.[52] The case of a judgment creditor is not within the letter of it, but is within its equity; and the letter would die did not construction come to its assistance."

The plaintiff's attorney should cause a description of the land to be annexed to the foreign attachment, and also an

[52] This wise assertion of a great judge is not in accord with the comfortable thought of the modern mind, fertile in "legislative expression."

additional description, for the fifty-first section requires the sheriff to file in the office of the prothonotary of the court a description of the property attached within five days after he shall have made the attachment, which description shall be entered by the prothonotary upon his docket and the names of the parties, with the date of the execution of the writ and the amount of bail required shall be entered upon his judgment-docket.

Even if the omission of the prothonotary to make such entry does not destroy the lien of the attachment against a subsequent mortgage without notice as was held in *McLaughlin* v. *Phillips,* 10 C. C., 382, none the less it is the part of wisdom on the part of the plaintiff's attorney to see that this effort to give constructive notice is duly made. It is submitted that there is force in the opinion of Judge Wickes on the obligation of the plaintiff in the foreign attachment. *Schall* v. *Rutledge,* 1 York, 33. He regards the duty of the plaintiff analogous to that of a judgment creditor to see that his judgment is rightly entered, citing *Ridgway, Budd & Co.'s Appeal,* 15 Pa., 177, and other cases.

PROCESS AND PROCEEDINGS WHERE ONE OR MORE OF THOSE JOINTLY LIABLE TO SUIT ARE NOT LIABLE TO FOREIGN ATTACHMENT.

The seventieth section of the Act of June 13, 1836, provides for a writ of attachment and summons combined and prescribes its form. *q. v.* The substance of this remedy is to be found in 1 Br. Pr., sec. 103. The summons is against the defendant or defendants within the jurisdiction, the attachment against all other defendants.

"The plaintiff proceeds under the summons against all it embraces, and so with the attachment. If judgment be entered against the first, execution issues; if this be not satisfied, it shall be lawful for the plaintiff to levy upon the goods attached. The court, however, has power to award execution if they see cause against the goods attached in the first instance, saving to all defendants their respective rights.

[58] See under Act of May 25, 1887, P. L. 271 *Corry* v. *R. R. Co.,* 194 Pa. 516.

If any defendant summoned obtain judgment upon a plea in bar of the whole action, and the plaintiff do not, within a year and a day sue out and prosecute a writ of error, the attachment may be dissolved."

The case proceeds against "the defendants attached" in the manner hereinbefore provided where all the defendants in such writ are attached.

The attachment does not bind partnership property, but the separate property of the non-resident defendant. White & Schnebly's Case, 10 Watts., 217. This form of attachment was held not to lie in cases of tort, because it applies only in cases of joint liability and in tort all the defendants are severally liable. *Boyer* v. *Bullard,* 102 Pa., 555—but, may plaintiff waive the tort and claim on contract when there is a contract either expressed or implied?[53] See *Boyce* v. *Permanent Life Ass.,* 218 Pa., 494.

It would be a pleasure to extend this article, already too long, and to consider the relation of suits begun by foreign attachment to some of the questions which are cognate to those so ably and fully treated in the English and American editions of Smith's Leading Cases in notes to the Duchess of Kingston's case, but a rapid discussion of such legal topics is simply impossible. It is a familiar rule that a judgment entered by a court having jurisdiction of both the parties and the subject-matter will be binding until the same is vacated or reversed. This is extended to judgments in cases of garnishment, but how far? Prohibitions of time and of space leave no opportunity to examine this subject. For condensed statements of the authorities in Pennsylvania the reader is referred to 8 Pepper & Lewis Dig. Dec., cols. 12478-12495. The cases are carefully digested under the heads: 1. When the attachment is pending. 2. When judgment has been obtained against the garnishee and paid by him.

For convenient reference this article may end with a partial

SYNOPSIS.

I. Statutes—Principal one, June 13, 1836, P. L. 580.

Acts cited here for subjects, not in order of date

Some extensions and amendments, viz; 1842—attachments of legacies, etc.

A. Causes of Action—Contracts, until TORT Acts of April 6, 1870, P. L. 960. (Local Philadelphia.)
and May 15, 1874, P. L. 183,
and March 30, 1905, P. L. 76.
In *Equity*, May 23, 1887, P. L. 163.
Against *vessels*, April 28, 1899, P. L. 102.

B. Affecting procedure.
May 8, 1889, P. L. 183, Judgt. by default.
April 9, 1870, P. L. 60, Assessment of Damages.
May 8, 1855, P. L. 532, Attachment of Interest of mortgagees or judgment creditors.
May 8, 1855, P. L. 533, sec. 4—Estrepment to prevent waste.
April 22, 1863, P. L. 527
June 11, 1885, P. L. 107
April 29, 1891, P. L. 35
} Counsel fee of garnishee.
May 12, 1897, P. L. 62 Abatement of writ for want of statement.
June 10, 1881, P. L. 106. Interpleader, but see 196 Pa. p. 123.
May 8, 1855, P. L. 532. Execution without security to restore.

II. When does foreign attachments lie?

against
- (a) Individuals.
- (b) Corporations.
- (c) Non-resident assignors for benefit of of creditors,
- (d) Joint debtors, one or more non-residents.

III. (1. What may be attached?
- (a) personalty?
- (b) real estate?

2. Who may be made garnishees?

IV. What proceedings?—(Credit 1 Br. Pr. sec. 105, *pro tanto.*)

A. By plaintiff—
Prepare praecipe.
Approval of Sureties.
See writ properly endorsed.
Instructions to Sheriff.

Bond of indemnity.
Prepare affidavit of cause of action.
(Incidental—sale of chargeable of perishable personalty.)
If no appearance by defendant take judgment at third term after execution of writ; having *filed statement,* (15 days prior; and within one year after service of writ).
Assess damages—Rule on Prothonotary to assess.
Issue Sci. Fa. v. garnishee—when?
(Phila. rule of court.)
File interrogatories—Rule on garnishee to answer.
Serve copy on garnishee, with notice of rule—Is Sci. Fa. necessary if garnishee has entered an appearance?
If no answer filed, what?
If insufficient answers, what?
Order on list. Prepare Paper book.
If answers admit liability, what rule?
If answers sufficient, what rule?
If judgment v. garnishee, what?
If defendant *appear* how does the cause proceed?

B. On part of *defendant.*

To quash—(evidence not part of record.)
Rule on plaintiff to show cause of action and why attachment should not be dissolved. (But is this an appearance of defendant?)
Defendant may appear and defend.
" " " " " and may give bail to dissolve attachment.
If he appear, may he be required to file affidavit of defense? How does the suit proceed? A *supra,* plaintiff's steps; under B defendant's defenses.

C. On part of garnishee.

To quash—(Evidence not part of record.)
Rule on plff. to show cause of action, etc.
(Right under Phila. C. P. Rule 20—to require plff. to issue Sci. Fa. within 3 mos. after judgment against deft.) (Right to require plff. to file interrogatories.) Practice after answer filed.
Right to counsel fee.
What duty, if any, to non-resident deft.?
Forms of judgment against garnishee.

Observe:

Effect and lien of attachment. What is the order of priority?
Security to restore.
Sci. Fa. ad disprobandum debitum.

It is hoped that the attempt in these pages to give an outline of foreign attachment in Pennsylvania, from statutes and decisions and in procedure, may be of use to some of those recently admitted to practice, as well as to students at law.

John W. Patton.

NOTE.—The foregoing article has been drafted in undue haste in response to the courteous urgency of the President Editor, to take the place in this number of the Review, of an essay which unavoidably has been delayed. There has been scant chance to follow the *saepe stilum vertas,* etc., of Horace, or for any needed revision. Yet here it is—such as it is—on the specified date. In the yachtman's words, "time allowance" for the homely craft is requested.